Supreme Court, U.S.
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No. 93-263

In The

# Supreme Court of the United States

October Term, 1993

MATT T. KOKKONEN,

*Petitioner,*

vs.

GUARDIAN LIFE INSURANCE COMPANY OF AMERICA; GUARDIAN INSURANCE AND ANNUITY CORPORATION; and GUARDIAN INVESTOR SERVICES CORPORATION,

*Respondents.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Ninth Circuit**

## JOINT APPENDIX

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**Petition For Writ Of Certiorari Filed August 16, 1993**
**Certiorari Granted October 18, 1993**

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## RELEVANT DOCKET ENTRIES

| Docket No. | Description |
|---|---|
| 1. | Notice of Removal |
| 12. | First Amended Complaint |
| 24. | Answer to the First Amended Complaint |
| 28. | Counterclaim |
| 77. | Stipulation and Order dismissing Guardian Investor Services Corporation and Guardian Insurance and Annuity Corporation |
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97. Transcript of Hearing on Motion to Enforce Settlement

98. Order Enforcing Settlement Agreement





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THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, GUARDIAN INSURANCE AND ANNUITY COMPANY, GUARDIAN INVESTOR SERVICES CORPORATION


UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| MATT T. KOKKONEN and JEAN KOKKONEN,<br><br>Plaintiffs,<br><br>v.<br><br>THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, GUARDIAN INSURANCE AND ANNUITY CORPORATION, GUARDIAN INVESTOR SERVICES CORPORATION, and DOES 1 through 20, inclusive,<br><br>Defendants. | No. CV-F-90 325 REC<br><br>NOTICE OF REMOVAL (28 U.S.C. § 1446(a)) |

Pursuant to 28 U.S.C. § 1446(a) defendants The Guardian Life Insurance Company of America, Guardian

Insurance and Annuity Company, and Guardian Investor Services Corporation (collectively "The Guardian") hereby invoke this Court's jurisdiction under the provisions of 28 U.S.C. § 1332 and 28 U.S.C. § 1446(a) and state the following grounds for removal:

1. On or about April 6, 1990 plaintiffs Matt T. Kokkonen and Jean Kokkonen commenced an action in the Superior Court of the State of California for the County of Tulare, by filing a Complaint therein entitled, *Matt T. Kokkonen and Jean Kokkonen v. Guardian Life Insurance Company of America, Guardian Insurance and Annuity Company, Guardian Investor Services Corporation, and DOES 1 through 20, inclusive,* such case being No. 142022 in the files of said Court. The Guardian was served with the Complaint in said action on April 25, 1990. Copies of that Complaint and Summons are attached hereto as Exhibit A.

2. The above-described action is one in which this Court has original jurisdiction under the provisions of 28 U.S.C. § 1332 and is one which may be removed to this Court pursuant to the provisions of 28 U.S.C. § 1441 because it is a civil action involving citizens of different States and the controversy herein exceeds the sum or value of $50,000 exclusive of interest and costs. Defendants Guardian Life Insurance Company of America, Guardian Insurance and Annuity Company and Guardian Investor Services Corporation are corporations organized pursuant to the laws of the State of New York. With respect to each defendant, its principal place of business is the State of New York. Plaintiffs, and each of them, are citizens of the State of California. Furthermore, plaintiffs claim to suffer damages in a sum exceeding $2,000,000.



3. This Notice of Removal is timely in that it is filed within thirty (30) days of receipt of the Complaint by The Guardian.

4. All process, pleadings and orders served upon The Guardian have been attached hereto as Exhibit A pursuant to 28 U.S.C. § 1446(a).

5. The Guardian desires to remove said action to this Court as provided by law.

WHEREFORE, defendants, and each of them, pray that the above-said action now pending against them in the Superior Court of the State of California for the County of Tulare, be removed therefrom to the United States District Court for the Eastern District of California and pray said action stand so removed.

DATED: May 23, 1990

Respectfully submitted,

EPSTEIN BECKER & GREEN

By: /s/ James A. Napoli
James A. Napoli
Attorneys for Defendants
THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, GUARDIAN INSURANCE AND ANNUITY COMPANY, and GUARDIAN INVESTOR SERVICES CORPORATION

EXHIBIT "A"

SUMMONS
*(CITACION JUDICIAL)*

NOTICE TO DEFENDANT: *(Aviso a Acusado)*

GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,
GUARDIAN INSURANCE AND ANNUITY COMPANY,
GUARDIAN INVESTOR SERVICES CORPORATION, and
DOES 1 through 20, inclusive.

YOU ARE BEING SUED BY PLAINTIFF:
*(A Ud. le está demandando)*

MATT T. KOKKONEN and JEAN KOKKONEN.

*FOR COURT USE ONLY*
*(SOLO PARA USO DE LA CORTE)*

---

You have *30 CALENDAR DAYS* after this summons is served on you to file a typewritten response at this court.

A letter or phone call will not protect you; your typewritten response must be in proper legal form if you want the court to hear your case.

If you do not file your response on time, you may lose the case, and your wages, money and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may call an attorney referral service or a legal aid office (listed in the phone book).

*Después de que le entreguen esta citación judicial usted tiene un plazo de* 30 DIAS CALENDARIOS *para presentar una respuesta escrita a máquina en esta corte.*



*Una carta o una llamada telefónica no le ofrecerá protección; su respuesta escrita a máquina tiene que cumplir con las formalidades legales apropiadas si usted quiere que la corte escuche su caso.*

*Si usted no presenta su respuesta a tiempo, puede perder el caso, y le pueden quitar su salario, su dinero y otras cosas de su propiedad sin aviso adicional por parte de la corte.*

*Existen otros requisitos legales. Puede que usted quiera llamar a un abogado immediatamente. Si no conoce a un abogado, puede llamar a un servicio de referencia de abogados o a una oficina de ayuda legal (vea el directorio telefónico).*

CASE NUMBER: (Numero del Case)
142022

The name and address of the court is: *(El nombre y direccion de la conte es)*

*Tulare County Superior Court*
*County Civic Center*
*Visalia, California 93291*

*The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is:*

*(El nombre, la direccion y el numero de telefono del abogado del demandante, o del demandante que no tiene abogado, es)*

Richard B. Isham
Law Offices of Richard B. Isham
3120 West Main Street, Suite A
Visalia, California 93291-5728
Telephone: (209) 733-2257

---

JAY C. BAILESS
Clerk, by Sherry [illegible] Deputy
[illegible] (Actuario) *(Delegado)*

DATE: APR 06, 1990

[SEAL] NOTICE TO THE PERSON SERVED: You are served

1. [ ] as an individual defendant.

2. [ ] as the person sued under the fictitious name of *(specify)*:

3. [X] on behalf of *(specify)*: Guardian Investor Service Corporation
under: [X] CCP 416.10 (corporation)
[ ] CCP 416.20 (defunct corporation)
[ ] CCP 416.40 (association or partnership)
[ ] CCP 416.60 (minor)
[ ] CCP 416.70 (conservatee)
[ ] CCP 416.90 (individual)



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Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF TULARE

| | |
|---|---|
| MATT T. KOKKONEN and JEAN KOKKONEN,<br>Plaintiffs,<br>vs.<br>GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, GUARDIAN INSURANCE AND ANNUITY COMPANY, GUARDIAN INVESTOR SERVICES CORPORATION, and DOES 1 through 20, inclusive,<br>Defendants. | Civil No. [Illegible]<br>COMPLAINT FOR DECLARATORY RELIEF, WRONGFUL TERMINATION OF AGENCY AND GENERAL AGENCY AGREEMENTS AND DAMAGES<br>(Filed April 6, 1990) |

Plaintiffs MATT T. KOKKONEN and JEAN KOKKONEN, husband and wife, for causes of action against defendants, and each of them, allege as follows:

1. Plaintiffs are individuals who reside in the County of San Luis Obispo. Plaintiff MATT T. KOKKONEN is a seasoned and experienced Chartered Life Underwriter and Chartered Financial Consultant.

2. Defendants GUARDIAN LIFE INSURANCE COMPANY OF AMERICA (herein "G-LIFE"), GUARDIAN INSURANCE AND ANNUITY COMPANY (herein "G-ANNUITY") and GUARDIAN INVESTOR SERVICES CORPORATION (herein "G-SERVICES") are corporations organized pursuant to the laws of the State of New York. Said defendants are authorized by the State of California to do, and are doing, business in said State, including the County of Tulare.

3. The Agreement of General Agency (herein the "Agreement"), executed by defendant G-LIFE and plaintiff MATT T. KOKKONEN, was effective March 16, 1975, and includes Tulare County within the territory assigned to plaintiff. A copy of said Agreement is attached hereto and incorporated by reference as Exhibit 1 to this Complaint.

4. Plaintiffs are ignorant of the true names and capacities of Defendants DOES 1 through 20, inclusive, and therefore sue said defendants by such fictitious names. Plaintiffs allege that each of the fictitiously named defendants is responsible in some manner for the events and damages herein alleged. Plaintiffs will amend this Complaint to set forth their true names and capacities when ascertained, together with appropriate charging allegations.

5. Each defendant was the agent and/or employee of each other defendant or acted in concert with each



other defendant, and in doing the things herein alleged, was acting in the course and scope of such agency, employment or in concert of actions.

6. On or before March 16, 1975, plaintiff MATT T. KOKKONEN became an agent and general agent of defendant G-LIFE, as well as an agent and general agent of defendant G-ANNUITY. In addition, plaintiff held a management contract with defendant G-SERVICES, which provided that plaintiff MATT T. KOKKONEN would be compensated for providing service to clients on behalf of defendant G-SERVICES. Plaintiff worked diligently and created value in all the agencies and general agencies under his control and supervision in San Luis Obispo, California, and regarded these agencies, as did defendants, as property rights of plaintiffs which could not be withdrawn without plaintiffs' consent, or for good cause and then only with full and fair compensation for the value of the property withdrawn. Defendants referred to such agreements in general as "the best franchise in America. . . . " Plaintiffs concurred with this characterization. Plaintiff applied himself successfully as an agent and general agent until he was notified by defendants that effective October 31, 1989, his Agreement of General Agency, and by implication, all other agreements, would be terminated, or nonrenewed.

7. On or about January 9, 1989, defendants gave notice to plaintiff MATT T. KOKKONEN that defendants were imposing, unilaterally and for the first time ever, a production quota, and that should plaintiff fail to meet the quota for 1989, his resignation as agent and general agent would be expected. No new legal consideration

supported defendants' attempt to impose said production quota.

8. Before the end of calender year 1989, and by letter dated September 28, 1989, defendants gave notice to plaintiff of the termination of the Agreement, for plaintiff's alleged failure to meet 1989 production quotas. Defendants' attempt to cancel the Agreement was violative of the Agreement, and premature in any case. But for defendants' interruption of plaintiff's activities as an agent and general agent, plaintiff would have met or surpassed the alleged 1989 production quota, assuming without concession of the issue that any quota was legally binding for 1989. No other excuse or other alleged justification was offered by defendant GUARDIAN to explain the action it took against plaintiff.

9. Plaintiff MATT T. KOKKONEN protested defendants' effort to impose quotas in 1989, reminded defendants that no quotas had ever been in effect for him or other agents and general agents appointed in the time period when plaintiff was appointed, and further reminded defendants of an oral promise made to him by a high ranking corporate officer of defendant GUARDIAN, when he became an agent and general agent, that no quotas would ever be imposed on him or his general agency.

10. Furthermore, plaintiff is informed and believes, and thereupon alleges, that defendants arbitrarily enforced the alleged production quota against plaintiff, since other agents and general agents allegedly subject to such quotas failed to meet them, but remained nevertheless as duly authorized agents and general agents of



defendants, and suffered no termination of their respective agencies.

11. Defendant G-LIFE refused to cancel the notice of termination of the Agreement, and plaintiffs lost the value of the agency and general agency. The action taken by defendant G-LIFE was repeated by defendant G ANNUITY [sic] which subsequently refused to recognize the agency and general agency of plaintiff. Plaintiffs were not in default of the Agreement or any other agency or general agency agreements, and defendants were wholly unjustified in terminating the agency and general agency agreements and refusing to cancel the notice of termination when requested to do so by plaintiff MATT T. KOKKONEN.

12. As a result of the differences between plaintiffs and defendants over the interpretation of defendants' alleged right to unilaterally cancel the agencies and general agencies in question, there is a present controversy which the parties are unable to resolve without Court intervention. Plaintiffs therefore request the Court judicially declare the rights of the parties and find that plaintiff MATT T. KOKKONEN is an agent and general agent of defendants pursuant to the provisions of the written Agreement mentioned above, and the additional agreement between the parties.

FOR A FURTHER AND SEPARATE SECOND CAUSE OF ACTION, plaintiffs allege:

13. Plaintiffs re-plead the allegations of paragraphs 1 through 11, and incorporate said allegations herein as though fully set forth verbatim.

14. In the event the Court determines that declaratory relief is unavailable to the parties, defendants will nevertheless have caused plaintiffs to suffer damages in a sum exceeding $2 million, which represents the combined value of the agencies and general agencies wrongfully withdrawn and withheld from plaintiff by defendants.

FOR A FURTHER AND SEPARATE THIRD CAUSE OF ACTION, plaintiffs allege:

15. Plaintiffs re-plead the allegations of paragraphs 1 through 11, and incorporate said allegations herein as though fully set forth verbatim.

16. Pursuant to the terms of the agency and general agency agreements, defendants are indebted to plaintiffs, and plaintiff MATT T. KOKKONEN is indebted to defendants G-LIFE and G-ANNUITY in sums and amounts which are presently unknown to plaintiffs. Defendants uniquely possess the information and data necessary to determine the amounts due from one party to the other. Defendants have wholly failed to account for the funds which it owes to plaintiff MATT T. KOKKONEN, and has similarly failed to clearly inform plaintiff MATT T. KOKKONEN what amounts it claims are owed by said plaintiff to defendants.

17. Defendants owe a fiduciary duty to plaintiff MATT T. KOKKONEN to account for the funds held by defendants, and to promptly advise plaintiff of any claimed credits or other offsets which would tend to decrease the amount of the funds due from defendants to plaintiff. Defendants have breached this fiduciary duty by withholding, or diverting, funds from said plaintiffs.



FOR A FURTHER AND SEPARATE FOURTH CAUSE OF ACTION, plaintiffs allege:

18. Plaintiffs re-plead the allegations of paragraphs 1 through 6, and incorporate said allegations herein as though fully set forth verbatim.

19. Plaintiffs and defendants entered into a written commercial lease for a term of four months on October 30, 1989 whereby defendants leased certain real property and equipment from plaintiffs. Pursuant to the terms of the written lease agreement, defendants agreed to pay monthly rental of $2600.00, plus extra charges for equipment, telephone, copier, postage machine, and other office equipment usage, according to the memorandum of the lease, a copy of which is attached hereto and incorporated by reference as Exhibit 2 to this Complaint.

20. Defendants took possession of the leased premises, paid one month of rental, and then abandoned the premises and failed to pay the remaining three months rental, which is now due and payable.

21. Defendants are now liable to plaintiffs in the sum of $ 8640.00, as plaintiffs have been unable to relet the leased premises for the account of said defendants.

FOR A FURTHER AND SEPARATE FIFTH CAUSE OF ACTION, plaintiffs allege:

22. Plaintiffs re-plead the allegations of paragraphs 1 through 6, and incorporate said allegations herein as though fully set forth verbatim.

23. Defendants wrongfully and without good or reasonable cause denied the existence of said commercial rental agreement, citing as its basis for doing so the fact

that said commercial rental agreement was not in writing. Plaintiffs assured defendants that the commercial rental agreement was enforceable, yet defendants chose deliberately to deny the existence of said agreement.

24. Defendants' conduct under the circumstances was unjustified, and under the law of this State, plaintiffs should be awarded exemplary damages.

FOR A FURTHER AND SEPARATE SIXTH CAUSE OF ACTION, plaintiffs allege:

25. Plaintiffs re-plead the allegations of paragraphs 1 though 11, and incorporate said allegations herein as though fully set forth verbatim.

26. Following the termination of the Agreement described herein, defendants authorized plaintiff MATT T. KOKKONEN to "put your personal production with any agency that has San Luis Obispo County as its territory." Plaintiff relied on defendants' written authorization, and continued in good faith to attempt to place such business with said defendants.

27. Defendants promised thereafter to retain a working relationship with plaintiff MATT T. KOKKONEN, whereby he would continue to serve as an agent or broker for defendants, by associating with any general agency of defendants which serviced the San Luis Obispo County area.

28. Plaintiff MATT T. KOKKONEN undertook to place such business through general agencies of defendants that serviced the San Luis Obispo area, including the general agencies in Los Angeles and Fresno, California. Defendants interferred [sic] with plaintiff's activities,



however, and instructed the general agents in question not to accept business from plaintiff, and then informed plaintiff, in derogation of the agreement of the parties, that he could only place such business through a new general agency being formed in San Luis Obispo, California.

29. Defendants informed plaintiff MATT T. KOKKONEN the reason he was no longer permitted to place business through the Los Angeles and Fresno general agencies, and was required to use the new San Luis Obispo general agency exclusively, was because said general agency needed the revenue to be generated by plaintiff's activities in the area. The requirement to use the San Luis Obispo general agency exclusively was punitive as to plaintiff because said general agency was under direct management control of the home office of defendants, and the new general agents were therefore unable to compensate plaintiff at rates equivalent to those offered by the other qualified general agencies. Furthermore, defendants violated their own rules in requiring plaintiff to place said business with a particular general agency when other general agencies also serviced the San Luis Obispo area.

30. Aside from any question whether defendants had authorized plaintiff to place life insurance business through general agencies other than the one in San Luis Obispo, plaintiff was justified in not placing business through the San Luis Obispo general agency for other reasons. The new general agents were former subordinates of plaintiff, and a continued business relationship, under the circumstances, was impossible. Activities of the new general agents and their staff personnel frustrated

plaintiff's efforts to be properly credited for business which he generated. File codes were changed, inadvertantly [sic] or otherwise, so that commission overrides were misapplied, and plaintiff was deprived, until he brought these matters to defendants' attention and they were corrected, of income to which he was entitled, and defendants still have not accounted to plaintiff for monies due plaintiff from defendants, at least with sufficient detail to permit an objective assessment of the amounts due, compared to those actually paid or otherwise credited. One of the new general agents gained unauthorized access to plaintiff's computer data base and then made unauthorized contact with plaintiff's clients and customers in an attempt to compete unfairly with plaintiff. One of the new general managers replaced a significant whole life insurance policy sold by plaintiff some years before with a new policy which prejudiced both plaintiff and the policyholder. The change was made on the strength of an allegedly forged document, and the matter is under investigation by law enforcement agencies.

31. Plaintiff MATT T. KOKKONEN informed defendants of his unwillingness to place business through the San Luis Obispo general agency, as well as his reasons for his position. Defendants retaliated by refusing to extend any brokerage or agent's agreement to him. Defendants informed plaintiff that "The Guardian, The Company is no longer interested in offering you one [a contract] under any circumstances."

32. The wrongful conduct of defendants in terminating plaintiff's Agreement of General Agency, followed by defendants' wrongful denial of the existence of the commercial rental agreement and bad faith refusal to



issue an agent's or brokerage agreement to plaintiff, have gravely damaged plaintiffs. Plaintiffs lost the value of their general agency and the expectation of its increased value with the passage of time as plaintiffs advanced toward retirement age. Furthermore, plaintiff MATT T. KOKKONEN lost the benefit of clientele he had developed over many years, since defendants interfered with plaintiff's contact with them by imposing improper restrictions on the release of policyholder information to plaintiff.

33. Defendants' wrongful actions against plaintiffs were retaliatory and motivated by an intent to harm them, and were carried out with despicable and willful disregard of the consequences to others including plaintiffs. Defendants were not justified in terminating defendant's Agreement of General Agency, paying one month of rental and then denying the existence and enforceability of the commercial rental agreement, authorizing plaintiff to place life insurance business through any authorized general agency, then insisting plaintiff place his business exclusively through the San Luis Obispo general agency, and finally refusing to grant an agent's or brokerage agreement under any circumstances when plaintiff, with good cause, refused to place business through the San Luis Obispo general agency. Accordingly, plaintiffs are entitled to an award of exemplary damages, under the circumstances.

WHEREFORE, plaintiffs pray judgment as follows:

1. For a declaration of the rights of the parties;

2. For general damages according to proof;

3. For exemplary damages;

4. For costs of suit herein; and

5. For such other and further relief as the court may deem proper.

Dated: April 6, 1990

LAW OFFICES OF
RICHARD B. ISHAM

By /s/ Richard B. Isham
Richard B. Isham
Attorneys for Plaintiffs

---



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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| MATT T. KOKKONEN,<br>Plaintiff,<br>vs.<br>GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, GUARDIAN INSURANCE AND ANNUITY COMPANY, GUARDIAN INVESTOR SERVICES CORPORATION,<br>Defendants. | No. CV-F-90-325 REC<br>FIRST AMENDED COMPLAINT FOR WRONGFUL TERMINATION OF EMPLOYMENT, BREACH OF FIDUCIARY DUTY, INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE FRAUD, BREACH OF LEASE, WRONGFUL DENIAL OF LEASE, AND DAMAGES: GENERAL AND EXEMPLARY |

Plaintiff MATT T. KOKKONEN for causes of action against defendants, and each of them, alleges as follows:

1. Plaintiff is a citizen of the State of California, and resides in the County of San Luis Obispo.

2. Defendants GUARDIAN LIFE INSURANCE COMPANY OF AMERICA (herein "G-LIFE"), and GUARDIAN INSURANCE AND ANNUITY COMPANY

(herein "G-ANNUITY") and GUARDIAN INVESTOR SERVICES CORPORATION (herein "G-SERVICES") are citizens of the State of New York.

3. Each defendant was the agent and/or employee of each or every defendant or acted in concert with each or every defendant, and in doing the things herein alleged, was acting in the course and scope of such agency, employment or in concert of actions.

4. An Agreement of General Agency (herein the "Agreement"), executed by defendant G-LIFE and plaintiff, was effective March 16, 1975. A copy of the Agreement (Exhibit "1") is attached to this Complaint and by reference incorporated herein.

5. Said Agreement recites that plaintiff was an independent contractor, but defendants treated him as an employee nevertheless. Defendants enrolled plaintiff in group health and disability plans and a retirement plan, which were available only to employees of defendants.

6. Said Agreement was amended in January 1989 by the parties to include, among other things, a production quota. A memorandum of said amendment dated January 9, 1989 (Exhibit "2") is attached to this Complaint and by reference incorporated herein. The parties subsequently agreed orally that plaintiff's agency status with defendants continued indefinitely, so long as he met the new production quota. Said amendment had the effect of eliminating either party's right to cancel the Agreement for no cause, under Section 5, since plaintiff's tenure under the amended Agreement became a function of his productivity.



7. In violation of the amended Agreement, defendant G-LIFE gave notice of cancellation of the Agreement on or about September 28, 1989 (Exhibit "3"), a copy of which is attached to this Complaint and by reference incorporated herein. Defendant's cancellation of the Agreement was premature since plaintiff's production performance could not have been fairly evaluated before the close of calender [sic] year 1989.

8. Subsequent to Plaintiff's receipt of the September 28, 1989 notice, the parties further agreed that plaintiff would remain with defendants as an agent, he would continue to produce new business for defendants and place it through any agency that has San Luis Obispo County as its territory, he would continue to service his existing clientele, many of whom were policyholders who had purchased Guardian Life Insurance products, and he would continue to receive income from his vested renewals. Defendants forwarded a written memorandum dated October 30, 1989, confirming this further amendment of the Agreement. A copy of the memorandum (Exhibit "4") is attached to this complaint, and by reference incorporated herein.

9. Plaintiff, at defendants' request, turned over his filed on his clients to defendants, relying on defendants' assurances that he would be given access to the files upon request. Plaintiff leased a portion of office space to defendants who agreed to establish a company controlled agency in San Luis Obispo, California.

10. Defendants represented in 1975 to plaintiff that defendants would never impose sales quotas, plaintiff could expect to work for defendants until retirement and

accumulate vested retirement benefits as well as rights to income generated by renewals of life insurance policies, and that plaintiff had the "best franchise in America." Plaintiff relied upon defendants' representations and through diligent application of his effort created value in all the agencies and general agencies under his control and supervision in San Luis Obispo, California.

11. During 1989 and thereafter, defendants refused to pay plaintiff sums due him as income from "vested" renewals of policies, and failed to account for monies held by defendants for plaintiff's account. Furthermore, defendants have recoded policies generated by plaintiff and his agents for the purpose of diverting incomes flows from plaintiff to others.

**FOR A FIRST CAUSE OF ACTION (WRONGFUL TERMINATION OF EMPLOYMENT),** Plaintiff alleges:

12. The Agreement, as amended from time to time by the parties, recites that plaintiff is an independent contractor and not an employee of defendants. However, plaintiff occupied a position of both independent contractor and employee, since defendants included plaintiff in employee benefit programs and plans which may only be offered by law to persons who were truly employees of defendants. Defendants treated plaintiff as an employee for life, whose employment termination could only take place for cause.

13. Defendants wrongfully terminated plaintiff's employment with defendants, since they did so without cause. Plaintiff suffered injury and damage in excess of the sum of $50,000. Defendants' conduct was carried out with intent to annoy, vex and harrass plaintiff, and their



conduct was despicable under the circumstances, thus plaintiff is entitled to an award of exemplary damages.

**FOR A FURTHER AND SEPARATE SECOND CAUSE OF ACTION (BREACH OF FIDUCIARY DUTY AND FAILURE TO ACCOUNT),** Plaintiff alleges:

14. Plaintiff repleads the allegations of Paragraphs 1 through 11 of this Complaint and incorporates said allegations as though repeated verbatim herein.

15. Defendants are in receipt of funds which rightfully belong to plaintiff. Said funds constitute income accruals due plaintiff from renewals of policies and other related income generating activities of plaintiff. Defendants owe a fiduciary duty to plaintiff to account for said funds and distribute them promptly when due to plaintiff.

16. Defendants violated the fiduciary duty described herein by refusing to account for, and distribute to plaintiff, funds due him. Plaintiff is entitled to an accounting of said funds. Furthermore, plaintiff is entitled to an award of exemplary damages since defendant's actions were carried out with intent to annoy, vex and harrass plaintiff, and their conduct was despicable under the circumstances.

**FOR A FURTHER AND SEPARATE THIRD CAUSE OF ACTION (INTERFERENCE WITH PROSPECTIVE BUSINESS ADVANTAGE),** plaintiff alleges:

17. Plaintiff repleads the allegations of Paragraphs 1 through 11 of this Complaint and incorporates said allegations as though repeated verbatim herein.

18. Defendants, during 1989 and continuing to the present time, have consistently denied plaintiff access to his files, have accessed his files for the purpose of contacting his clients and soliciting their business, and have contacted and solicited business for defendants' benefit. Defendants have refused to provide information from such files upon plaintiff's request or the request of the policyholder or other person whose information is being withheld by defendants. Defendants have notified essentially all of plaintiff's clients, in writing, that plaintiff is no longer authorized to place business for defendants. Said notices were sent for the purpose of creating a false impression that plaintiff had engaged in unfair or unlawful practices, and had been sanctioned by defendants.

19. Said notices were false because plaintiff had not engaged in any unfair or unlawful practices, and furthermore defendants consistently included plaintiff as one of their authorized agents, according to records maintained by the Insurance Commissioner of the State of California, based upon information supplied by defendants to said Commissioner, as required by state law.

20. Plaintiff has been damaged by defendants' unlawful conduct, in an amount which exceeds the sum of $50,000. The wrongful conduct of defendants in interferring [sic] with plaintiff's existing clientele and diverting renewal income to others was carried out with intent to vex, annoy and harrass plaintiff. Plaintiff lost the value of his life insurance, health, group, annuity and equity businesses, including the expectation of their increased value with the passage of time as plaintiff advanced toward retirement age. Defendants' wrongful actions against plaintiff were retaliatory and motivated by an



intent to harm him, and were carried out with despicable and willful disregard of the consequences to plaintiff. Accordingly, plaintiff is entitled to an award of exemplary damages.

**FOR A FURTHER AND SEPARATE FOURTH CAUSE OF ACTION (FRAUD),** plaintiff alleges:

21. Plaintiff repleads the allegations of Paragraphs 1 through 11 of this Complaint and incorporates said allegations as though repeated verbatim herein.

22. Plaintiff's execution of, and performance under, the Agreement was obtained as a result of false representations made by defendants that plaintiff could expect to enjoy a lifetime relationship with defendants, and in the process create sizeable [sic] monetary value in the San Luis Obispo General Agency. Defendants' representations were false. On or about January 9, 1989, defendants gave notice to plaintiff that defendants were imposing, unilaterally and for the first time ever, a production quota, and that should plaintiff fail to meet the quota for 1989, his resignation as agent and general agent would be expected. No new legal consideration supported defendants' imposition of said production quota.

23. Defendant G-LIFE refused to cancel the notice of termination of the Agreement, and plaintiff lost the substantial value of the agencies and general agencies. The action taken by defendant G-LIFE was repeated by defendant G-ANNUITY and the remaining defendants which subsequently refused to recognize the agency and general agency of plaintiff. Plaintiff was not in default of the Agreement, as amended, or any other agency or general agency agreements, and defendants were wholly unjustified in terminating the agency and general agency

agreements. Defendants' actions demonstrated the falsity of their representations that the Agreement would not be terminated, except for cause. Plaintiff incurred damages in excess of $50,000 as a result of the fraudulent conduct of defendants. As a result of the fraud perpetrated by defendants upon plaintiff, he is entitled to an award of exemplary damages.

**FOR A FURTHER AND SEPARATE FIFTH CAUSE OF ACTION (BREACH OF LEASE),** plaintiff alleges:

24. Plaintiff repleads the allegations of paragraphs 1 through 11, and incorporates said allegations herein as though fully set forth verbatim.

25. Plaintiff and defendants entered into a written commercial lease for a term of four months on October 30, 1989 whereby defendants leased certain real property and equipment from plaintiff. Pursuant to the terms of the written lease agreement, defendants agreed to pay monthly rental of $2,000, plus extra charges for equipment, telephone, copier, postage machine, and other office equipment usage, according to the memorandum of the lease, a copy of which is attached hereto and incorporated by reference as Exhibit 2 to this Complaint.

26. Defendants took possession of the leased premises, paid one month of rental, and then abandoned the premises and failed to pay the remaining three months rental, which is now due and payable.

27. Defendants are now liable to plaintiff in the sum of $6,000 plus rental attributable to equipment which was also leased by defendants, as plaintiff was unable to relet the leased premises or the equipment for the account of said defendants.



**FOR A FURTHER AND SEPARATE SIXTH CAUSE OF ACTION (WRONGFUL DENIAL OF EXISTENCE OF LEASE AGREEMENT),** plaintiff alleges:

28. Plaintiff repleads the allegations of paragraphs 1 through 11, and incorporates said allegations herein as though fully set forth verbatim.

29. Defendants wrongfully and without good or reasonable cause denied the existence of said commercial rental agreement, citing as their basis for doing so the fact that said commercial rental agreement was not in writing. Plaintiff assured defendants that the commercial rental agreement was enforceable, yet defendants chose deliberately to deny the existence of said agreement.

30. Defendants' conduct under the circumstances was unjustified, and under the laws of the State of California, plaintiff is entitled to an award of exemplary damages.

**WHEREFORE,** plaintiff prays judgment as follows:

1. For general damages in excess of $50,000;

2. For exemplary damages;

3. For costs of suit herein; and

4. For such other and further relief as the court may deem proper.

Dated: August 14, 1990.

LAW OFFICES OF
RICHARD B. ISHAM

By: /s/ Richard B. Isham
Richard B. Isham
Attorneys for Plaintiffs

## EXHIBIT "1"

## AGREEMENT OF GENERAL AGENCY

PARTIES: COMPANY – THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, A CORPORATION INCORPORATED UNDER THE LAWS OF THE STATE OF NEW YORK.

PRINCIPAL – Matt T. Kokkonen, CLU of San Luis Obispo, State of California

EFFECTIVE DATE: January 1, 1982

THIS AGREEMENT is made between the parties for an indefinite period. It may be terminated as stated in Section 5.

It includes the following sections and appendices.

| SECTION OR APPENDIX | GENERAL DESCRIPTION |
|---|---|
| Section 1 | Appointment, territory, authority and duties. |
| Section 2 | Overriding commissions, payment rules. |
| Section 3 | Collection fees defined, method of payment. |
| Section 4 | Expense reimbursement allowance. |
| Section 5 | Termination provisions, compensation after termination. |
| Section 6 | Miscellaneous provisions. |
| Section 7 | Additional Remuneration: fixed fee and variable compensation. |



| | |
|---|---|
| Appendix A | Agreement of Agency (Full Time Agent's Agreement). |
| Appendix B | Schedule of producer commissions-Individual Life. |
| Appendix C | Schedule of producer commissions-Pension Trust |
| Appendix D | Schedule of producer commissions-Health Insurance. |
| Appendix E | Schedule of producer commissions-Group Insurance. |
| Appendix F | Overriding commission schedules. |
| Appendix G | Schedule of Expense Reimbursement Allowances. |
| Appendix H | Waiving of the Life Termination Deduction. |

IN WITNESS WHEREOF, This Agreement has been signed in two copies by the Principal and by an authorized officer of the Company on this 5 day of May 1982.

In the presence of THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA

/s/ Francine Niesiti /s/ Timothy Lavey
Authorized Company Officer

In the presence of

/s/ Theresa A. [Illegible] /s/ Matt Kokkonen

## SECTION 1

### APPOINTMENT – AUTHORITY AND DUTIES OF PRINCIPAL

(A) APPOINTMENT AND TERRITORY

The Company hereby appoints the Principal as of the effective date as General Agent of its Agency at San Luis Obispo referred to as the Office. His territory shall be: The Counties of Monterey, San Benito, Fresno, Kings, Tulare, Inyo, San Luis Obispo, Kern, San Bernadino, and Santa Barbara, in the State of California and the State of Alaska. This territory is not exclusive as the Company may at its sole discretion open additional offices within the territory.

(B) AUTHORITY AND DUTIES

(1) The Principal shall devote his full time to developing and managing the Agency and the business of the Company in his territory. He shall have the authority to appoint agents and brokers within his territory, subject to the approval of the Company. He shall aid the Company in securing the services of Field Representatives in his territory and he shall have the authority with the concurrence of the Company to terminate the services of a Field Representative assigned to his office as provided in the Field Representative's Agreement with the Company.

(2) The Principal, his agents, brokers and Field Representatives (herein sometimes referred to as producers) shall have the right to collect money upon the conditional receipt forms attached to applications for policies and contracts of the Company in accordance with the Company's rules and to collect



the initial premium specified in such policies and contracts. He shall be responsible to the Company for all conditional receipts thus detached from applications. All money received for the Company by the Principal, or any of his employees, agents, brokers or Field Representatives shall be treated by him as trust funds.

(3) He shall have no power or authority other than that expressly granted in this Agreement. He shall have no power or authority to make, alter or discharge any contract in the name of the Company; or, to bind the Company by any promise or statement; or, to make, accept or endorse notes; or, to incur any liability on behalf of the Company; or, to waive a forfeiture; or, to waive, alter or amend the terms or conditions of any policy or other contract to which the Company is a party; or, to extend the time for the payment of a premium.

(4) He shall comply with and be bound by the rules and regulations of the Company now in force or as they hereafter may be amended or supplemented including but not limited to those contained in the Company's "Agents Manual", "Instructions for Agency Offices" and its "Field Representatives' plan".

(5) The Principal shall not have the right, nor shall he grant the right to any of his agents, brokers and Field Representatives, either personally by any correspondence or in any other manner, to solicit applications for insurance or annuities outside the territory stated above unless the written consent of the Company shall have been previously obtained. With respect to Group Insurance, Group Annuity, and Pension Trust Insurance, the Principal grants, on a reciprocal basis, a complete territorial release for the solicatation [sic] of these types of insurance, and

he waives any interest on such business solicited by producers not under contract with him.

(6) All books and records kept by the Principal in connection with the business of the Company are the property of the Company and shall be returned on demand.

(7) The Principal shall be under a satisfactory bond of indemnity in a form and amount to be approved by the Company.

(8) The Principal shall make all commission payments to agents and brokers assigned to the Principal's Office on a prompt and timely basis.

## SECTION 2

## COMMISSIONS

The commission payments made in accordance with provisions of this section and the attached Appendices, together with collection fees and additional remuneration, if any, and the expense reimbursement provided for in other sections, shall constitute full compensation to the Principal for his services and his expenses under this Agreement. No commissions, compensation or reimbursement shall be allowed, except as herein provided.

In addition, the Company will reimburse the Principal for all commissions, persistency fees and persistency payments to producers that he is contractually obligated to pay and does pay to such producers under contracts approved by the Company, but, in no event, in excess of those stated in this section and in the Appendices contained herein.



### (A) GENERAL

Whenever in this contract reference is made to Life insurance or Health insurance, such reference shall not include Group insurance, unless specifically mentioned.

The New York Insurance Law prohibits the Principal from paying commissions to his agents in excess of those stated in the Appendices attached herein. A duplicate original of each contract between the Principal and his agents who are eligible to receive payments of commissions, supervisory compensation, expense reimbursement or any other emoluments shall be filed with the Company.

### (B) COMPENSATION FOR PERSONAL PRODUCTION OF THE PRINCIPAL

For Life and Health business issued on applications submitted by the Principal personally as agent of record, the Company will pay to the Principal commissions in accordance with the Agreement of Agency (Appendix A) and Appendices attached herein. The commission payment rules of such Agreement of Agency and supplements apply.

Commissions on Group insurance and Group annuity business issued on applications submitted by the Principal personally as agent of record will be payable in accordance with the commission payment rules contained in Appendix E attached herein.

The provision for the payment of persistency fees on Life insurance, as stated in the Agreement of Agency (Appendix A), does not apply with respect to the business submitted by the Principal personally under this Agreement. Persistency payments and Variable Renewal Compensation will be made, if earned, according to Appendix D on the Health business produced by the Principal as agent of record.

## (C) OVERRIDING COMMISSIONS

During the continuance of this Agreement, the Principal shall receive from the Company overriding commissions on Life insurance and annuities, Health insurance, Group insurance and Group annuities on such business produced by the Principal as agent of record and by agents or brokers under an agreement of agency or brokerage agreement with the Principal and by Field Representatives assigned to the Principal's Office, in accordance with the overriding commission schedules contained in Appendix F attached herein and the following General Payment Rules.

Overriding commissions payable to the Principal by the Company after termination of this Agreement shall be made in accordance with the provisions of Section 5, Section 6 and Appendix H attached herein.

## (D) GENERAL PAYMENT RULES

The Payment to the Principal of such commissions is subject to the following rules:



(1) Overriding commissions are payable on premiums actually collected and accounted for in cash or by check only when such check has been honored at the Home Office of the Company during the continuance of this Agreement on policies issued and paid for pursuant to this Agreement upon applications solicited on or after the effective date of this Agreement.

(2) Overriding commissions on Life Insurance premiums paid for by supplemental benefits shall be paid at the same rate as is then payable on the premium then due on the policy to which the supplemental benefits are attached.

(3) No overriding commissions shall be paid on:

(a) temporary extra premiums.

(b) life insurance extra premium on a rated basis and permanent flat extra premiums.

(c) premiums for interim term (life) insurance.

(d) premiums (Health or Group) waived on account of disability or under Applicant's Waiver of Premium Benefit.

(e) premiums waived on account of disability or on premiums waived on account of disability under a Combined Waiver of Premium Benefit except if such premiums of life insurance only are waived on account of a disability that began on or after February 1, 1971.

(f) any reserve adjustment paid to the Company on any change of policy form.

(g) the payment necessary to make a policy paid-up either by application of dividends or otherwise.

(h) nor on premiums paid on exchange of Pension Trust Series policies and contracts at retirement age according to the special exchange rider attached to such policies and contracts.

(4) Overriding commissions will be paid if and as they accrue on premiums paid by policy loans or application of dividends.

(5) On premiums paid in advance, other than for Health policies, the overriding commissions will not be paid until the contractual due date of such premiums.

(6) All commissions paid on premiums refunded by the Company for any reason shall be repaid to the Company. If not so repaid such commissions shall constitute an indebtedness of the Principal to the Company.

(7) Overriding commissions on premiums paid on any form of reinstatement, on conversion or renewal of Term Insurance and Annuities or on increase in Health Premiums on account of change in coverage, as well as designation of the person entitled thereto, shall be paid only in accordance with the Company's rules in effect when the reinstatement, conversion, renewal or change is made.

(8) No overriding commissions shall be paid on premiums on policies issued as the result of the conversion of Group Insurance of any kind.

(9) No renewal overriding commissions shall be paid for any policy year beyond the premium paying period.

(10) For policies of insurance or annuities other than those mentioned in the preceding schedule of overriding commissions, the overriding commission



rates will be specially quoted upon request to the Company.

(11) Commissions on a new policy which is replacement of previously issued insurance in this Company will be paid only in accordance with the Company rules in effect when the replacement is issued.

(12) Whenever in any calendar year the Principal's personal paid for Life Insurance production shall exceed fifty percent (50%) of the total paid for Life Insurance production of the Agency, the first year overriding commissions on the total Life business of the Agency paid for during such calendar year shall be reduced in accordance with subsection 4 of Section 213 (as amended) of the Insurance Law of the State of New York.

(13) If it so elects, the Company may administer and service any Pension Trust previously administered and serviced by the Principal. In that event, a service fee shall be paid to the Company by the Principal.

## SECTION 3

## COLLECTION FEES

The Principal may be paid at the discretion of the Company 1½% of all life insurance renewal premiums beyond the fifteenth policy year due and collected for the Agency during the calendar year including the fractional part of any calendar year that this Agreement is in force. If this 1½% Collection Fee is paid to the Principal in cash, it shall reduce the amount of Renewal Service Expense Allowance as outlined in Appendix G, Schedule G-I, paragraph (D).

For purposes of determining expense reimbursement, first year life commissions and first year life overrides in excess of 96% of first year life and annuity premiums under Regulation 49 as outlined in Section 4 of this Agreement, there shall be excluded (1) any 1½% Collection Fees paid in cash to the Principal, (2) any 1½% Collection Fees payable to the Principal but not paid at the discretion of the Company and (3) 1% of life insurance renewal premiums for policy years two through fifteen inclusive on such premiums initially paid for under previous agreements signed by a principal differing totally from the Principal under this Agreement.

## SECTION 4

## EXPENSE REIMBURSEMENT ALLOWANCES

Part of the Principal's remuneration is called "Expense Reimbursement Allowances." It is defined and limited by 1) expenses approved by the Company, 2) necessity for detailed vouchers as required by the New York Insurance Department, 3) calculations based on Appendix G, attached and a part hereof and 4) the maximum set by Insurance Department "Regulation 49."

Regulation 49 where applicable in any calendar year, requires that no expense reimbursement shall be made which, together with first year life insurance commissions (including first year overriding commissions), would be in excess of 96% of first year premiums on individual life and annuity business produced by the Agency.

In the computations under the Appendix G a "calendar year" shall include any fractional part of a calendar year



that this Agreement is in force and "year" shall mean calendar year, unless otherwise specified.

"Contract year" shall mean each successive twelve-month period starting with the month in which this Agreement starts. Computations for a contract year shall be the parts of the calendar years falling within the contract year.

## LOANS AGAINST EXPENSE REIMBURSEMENT ALLOWANCES

In certain instances the Company may loan funds to the Principal based in part on the security of the remuneration to be earned under this section, hereinafter called "Expense Reimbursement Allowances." The Principal personally promises to repay such loans if not earned. If the Principal is a corporation, the officer-stockholders personally promise to repay such loans.

At the beginning of this Agreement and at the beginning of each calendar year thereafter, the Company and the Principal shall estimate the amount the Principal is expected to earn as Expense Reimbursement Allowances under the components set forth in the attached schedules.

The Company may use approximate methods and its calculations shall be conclusive.

The loans, if any, against annual Expense Reimbursement Allowances shall be set forth on the Company's Expense Routing Sheet and may be revised more often than annually. Any future advances to be made against unearned Expense Reimbursement Allowances may be terminated by the Company at any time in the sole discretion of the

Company. A loan against such allowances may be made in monthly installment [sic]

If the amounts loaned are less than the Expense Reimbursement Allowances, the excess shall be paid immediately in cash, subject to the furnishing of required vouchers and if the Expense Reimbursement Allowances are less than the amounts loaned, such excess shall be repaid in cash, and if not so repaid, shall be an item of indebtedness.

## SECTION 5

## TERMINATION OF AGREEMENT

### (A) CONDITIONS OF TERMINATION

This Agreement may be terminated at any time by either party by notice in writing to the other party. It shall terminate immediately without notice under any of the following conditions:

1. On the bankruptcy of the Principal.
2. If the Principal is a sole proprietor, on his death or retirement.
3. If the Principal is a corporation or a partnership, on its dissolution or loss of majority control by the present principals or death or retirement of a partner or an officer actively employed in the business of the General Agency.

### (B) COMPENSATION AFTER TERMINATION OF THIS AGREEMENT

For purposes of determining the application of termination deductions contained in this Section 5 and rules for



the waiving of the life termination deduction contained in Appendix H, the effective date of this Agreement shall be considered to be March 16, 1975.

1. If this Agreement is terminated by reason of death of the Principal or the death of a partner or officer of the Principal at any time, the overriding commissions as stated in Appendix F, less the termination deductions stated below, shall be paid to the Principal's lawful representatives. Some or all of the life termination deduction may be waived if the Principal has met all criteria at the time of death as stated in Appendix H.

2. If this Agreement terminates within or at the end of the first contract year, other than by death, no renewal overriding commissions shall be payable to the Principal.

3. If this Agreement terminates for any reason, other than death, after it has been in force for more than one year, the overriding commissions as stated in Appendix F, less the termination deductions stated below, shall be payable to the Principal. Some or all of the life termination deduction may be waived if the Principal terminates due to retirement or permanent disability and has met all criteria at such time as stated in Appendix H.

4. No termination deductions shall be imposed on the premiums of the first policy year.

5. The termination deductions for life insurance are equal to the following percentages of the premiums on which renewal overriding commissions are earned (but in no event more than such overriding commissions):

| Type of Coverage | Percentage Deduction of Renewal Premium at Termination for any reason, other than death, within or at end of period after the effective date stated in this Section 5 | | | | |
|---|---|---|---|---|---|
| | 2 yr. | 3 yr. | 4 yr. | 5 yr. | Thereafter |
| Life Insurance & Annuities: | 2% | 2% | 1% | 1% | 1% |
| Life Insurance & Annuities: | Termination by Death: 1% | | | | |

6. The termination deductions for health insurance are equal to the following percentages of the premiums on which renewal overriding commissions are earned and dollar amounts per policy (but in no event more than the applicable overriding commissions):

| Health Insurance Policy Years | Termination Deductions |
|---|---|
| 2-10 | 0% on NC75 and NC76<br>2% on all other plans except as follows for 2nd through 10th policy years<br>$6.40 on A&H 48<br>$16.00 on A&H 65 |
| 11 & Later | 3% on NC75 and NC76<br>5% on all other plans except as follows for 11th & Later policy years<br>$10.00 on A&H48<br>$16.00 on A&H65 |

Variable Renewal overridings for persistency will cease upon the termination of the Agreement.

7. The termination deductions for group insurance and group annuities is 50% of the overriding commission for policy years 2 to 10 inclusive and



100% of the overriding commission for policy years beyond the 10th year. Policy years are counted from the effective date of each group policy or contract.

(C) GENERAL PROVISIONS

In the event of the termination of this Agreement, if there are any commissions due or to become due from the Principal to the producers on premiums collected before or after such termination, the Principal hereby authorizes and empowers the Company to pay to such producers, their assigns or their legal representatives all such commissions payable in accordance with the provisions of their respective contracts.

In the case of such termination the Company shall also pay the Principal commissions on his personal production according to the provisions of the attached Agreement of Agency and Supplements.

Except as stated in Subsection (B) of this Section 5, it is expressly understood and agreed that, after the date of termination of this Agreement, the Principal or his legal representatives shall have no claim to any commissions, collection fees, expense reimbursements or any other form of compensation.

## SECTION 6

## MISCELLANEOUS PROVISIONS

(A) COMPANY LIEN IN CASE OF INDEBTEDNESS

Any and all indebtedness to the Company is due and payable in cash on demand to the Company by the

Principal and, in any event, on the termination of this Agreement of Agency.

The Company's books and records shall constitute evidence of such indebtedness. Such indebtedness arises when the Company lends funds or becomes liable for them on the Principal's behalf or as described by additional written agreements between the Company and the Principal, and shall include but not be limited to the following:

a) The excess of loans over earnings as described in Sections 4 and 7.

b) Loans against commissions made to the Principal either for his own account or for the purpose of financing Field Representatives, Full Time Agents or Brokers as described by separate agreements between the Principal and the Company.

c) Commissions reclaimed in accordance with the provisions of Appendix F of this Agreement.

d) The liability of the Principal under the terms of rental agreements with the Company for the rental of furniture and equipment, if any.

e) The liability of the Principal for salary extensions made to Field Representatives assigned to the Principal's office under the terms of the Agreement contained in the request for such Salary Extension.

f) Liability of the Principal to the Company for operating capital as described in a separate demand note executed by the Principal with the Company.



g) To assist the Principal in the conduct of his business and in the execution of this Agreement, the Company may provide the Principal with office space. In that event the Principal shall be indebted to the Company to the extent of the Company's expense thereof. On termination of this Agreement, the Principal's license to occupy the Company's space and Principal's liability therefore shall terminate. If upon termination of this Agreement the Principal shall hold the lease to the office space, the Company shall have sixty (60) days to remove its furniture, equipment and records from the premises.

The Company has a first lien upon any and all compensation or claims for compensation under this or any prior agreements, as security for payment of any indebtedness due or to become due from the Principal to the Company, or for payment of any financial loss which the Company may suffer or may become liable to suffer by reasons of any fraudulent or dishonest act on the part of the Principal or any attempt threat. [sic] Interest shall be computed on any such indebtedness or loss at the current rate established by the Board of Directors of the Company. If any interest is not paid in cash, it shall annually, on the 31st day of December of each year, be added to and become part of such indebtedness and bear interest at the current rate of interest set by the Company. Upon termination of this Agreement, the indebtedness shall bear interest to the full extent permitted by law.

The said indebtedness is due and payable in cash on demand to the Company without regard to whether any

renewal commissions, or the value thereof, may be payable in the future. The payment of all commissions and any and all other payments hereunder are subject to the indebtedness of the Principal to the Company.

(B) NOT ASSIGNABLE

No assignment of this Agreement or of any commissions or of any other monies due or to become due hereunder shall be valid except an assignment to the Company.

(C) PREVIOUS AGREEMENTS

All Agreements heretofore entered into by and between the parties hereto, whether oral or in writing, are hereby released, abrogated, and declared to be null, void and of no effect, except:

(1) agreements of any liabilities, obligations or any indebtedness of the Principal to the Company and liens created in connection therewith;

(2) agreements made between the Principal and the Company to the effect that commissions earned by his agents and brokers to be paid by the Company to them after the termination of the Principal's Agreement of Agency with the Company;

(3) the right to commissions hereafter accruing and earned under any prior agreement between the parties hereto subject to the offsets and counterclaims therein provided is not hereby impaired.



(D) DEDUCTIONS FROM PAYMENTS

All payments to the Principal are subject to any deductions required by law or authorized by the Principal and agreed to by the Company.

(E) INDEPENDENT CONTRACTOR

Nothing herein contained shall be construed to create the relation of employee and employer between the Principal and the Company.

Within the bounds of the Company's rules and regulations, the Principal shall be free to exercise his own judgement as to the time and place of solicitation within his territory of persons acceptable to the Company, as to the appointment of his agents and brokers within his territory, and as to the general conduct of his business.

All employees of the Office shall be employees of the Principal, except as provided by separate written agreement with the Company. However, all engagements of clerks and other persons and the terms of their continuance in service shall at all times be subject to the approval of the Company.

(F) FAILURE TO ENFORCE IS NOT WAIVER

Failure or omission of the Company to enforce any of the provisions of this Agreement or the failure or omission of the Company to exercise any of its rights or privileges under this Agreement shall not be deemed a waiver of any such provisions, rights, privileges, or terms. Any modification of any provision of this Agreement shall be

made only in writing by an authorized Officer of the Company.

(G) ENTIRE AGREEMENT

This instrument contains all the agreements and conditions made between the parties hereto whether oral or written. Any additions thereto or alterations or changes in this Agreement or other agreements hereinafter made to be binding, must be in writing signed by both parties.

## SECTION 7
## ADDITIONAL REMUNERATION

Notwithstanding the provisions of Section 2, the Company will pay the Principal additional compensation in accordance with (1) and (2) below while this Agreement remains in force.

(1) FIXED FEE:

| FROM: | TO | MONTHLY |
|---|---|---|
| | N/A | |

The fee is payable in monthly installments on the fifteenth day of each month.

(2) VARIABLE COMPENSATION:

Variable compensation shall be determined by applying a percentage of the calendar year's average rate per $1,000 of life insurance production credit resulting from the calculation described in Appendix G, Subdivision II, Part A to the current calendar year's new paid-for life insurance production credit of the agency (excluding, however, from such production



credit any credit resulting from personal production of the Principal, in excess of $500,000). The life insurance production credit (thus diminished) shall be divided into two parts: the first to be equal to the Production Base; and below, the second to be equal to the excess over the Production Base; and different percentages shall be applied to the two parts as stated below. In no event shall the variable compensation in any calendar year exceed $50,000, prorated for the number of months for which the Principal is entitled to it.

Notwithstanding these provisions, there shall be no payment of variable compensation for a contract year after the fifth, if the Principal's personally-produced life insurance production credit exceeds fifty percent (50%) of the total life insurance production credit of the agency.

| PERIOD FROM | PERIOD TO | PERCENTAGE OF AVERAGE RATE PER M APPLIED TO THE PRODUCTION BASE FOR THE PERIOD | PERCENTAGE OF AVERAGE RATE PER M APPLIED TO THE PRODUCTION CREDIT IN EXCESS OF THE PRODUCTION BASE FOR THE PERIOD |
|---|---|---|---|
| 1/1/82 | 12/31/82 | – | 8 3/4% |
| 1/1/83 | 12/31/83 | – | 4 3/4% |
| 1/1/84 | 12/31/84 | – | 2 1/2% |
| 1/1/85 | 3/15/85 | – | 2% |

The Production Base of the Principal for a full calendar year shall be $0

a. For the period from N/A to N/A and from N/A to N/A the Production Base shall be N/A.

b. For the period from N/A to N/A and from N/A to N/A the Production Base shall be N/A.

The variable compensation may be estimated by the Company in an appropriate amount at the beginning of each calendar year (initially, as of the effective date) and may be advanced in equal monthly installments together with the fee, if any.

Shortly after the end of each calendar year, the variable compensation will be finally determined on the basis of the recalculated allowance under Subdivision II, Part (A) of the maximum expense reimbursement. Any underpayment to the Principal as a result of the preliminary estimate shall be payable to him and any overpayment shall be repayable by him in cash to the Company. If not so repaid, it shall constitute indebtedness of the Principal to the Company.

If variable compensation has been advanced in any calendar year in which the Principal is not entitled to any part, or all of it, for having personally produced more than fifty percent (50%) of the total life insurance production credit of the Agency, that amount shall constitute an overpayment to the Principal and shall be repayable in cash by him to the Company. If not so repaid, it shall constitute an indebtedness of Principal to the Company.



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**EXHIBIT "2"**

**THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA**

WESTERN REGIONAL OFFICE
319 Diablo Road, Suite 202
Danville, CA 94526
(415) 837-4830

JOHN J. GORMAN, CLU
Senior Regional Director

January 9, 1989

Matt Kokkonen, CLU
General Agent
Guardian Life Insurance Company
1103 Johnson Street
San Luis Obispo, California 93401

Dear Matt:

As per our telephone conversation last week, January 3, 1989. The Guardian will begin looking for a General Agent to replace you in the central California area. In addition should I not suceed [sic] in this task you would need to produce $500,000 LAP in 1989 to maintain your General Agency Contract. Should you not produce the result we would expect your resignation as General Agent.

Should you have any questions please don't hesitate to call me.

Sincerely,

/s/ John J. Gorman
John J. Gorman, CLU
Senior Regional Director



/jd

cc: Robert Collins
Rick Neumann
Tim Lavey

**EXHIBIT "3"**

**The Guardian**

**201 Park Avenue South**
**New York, NY 10003**
**212/598-8042**

September 28, 1989

**Timothy E. Lavey, CLU**
*Second Vice President*
*Agency Administration*

Matt T. Kokkonen, CLU
The Guardian
1103 Johnson Street
San Luis Obispo, CA. 93401

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Dear Matt:

In accordance with Section 5 of your Agreement of General Agency with the Company, this letter will serve as official notification to you of the termination of the subject contract effective October 31, 1989.

You should shortly hear from personnel of the Field Services Department regarding various issues resulting

from your termination including the closeout of the agency bank account. Mike Monks will be in touch concerning the process of finalizing your 1989 GA financial results. In the meantime, if you should have any questions, please be sure to let me know.

Sincerely,

/s/ Timothy E. Lavey
Timothy E. Lavey, CLU
Second Vice President,
Agency Administration

TEL: fm

cc: R. Collins
R. Neumann
J. Gorman
F. LiVigni
W. Sheridan
M. Monks
J. Gagliano
M. Arvin
S. Knopf
L. Nitka

---

**EXHIBIT "4"**

**The Guardian** **Interoffice Memo**

To: Matt Kokkonen - San Luis Obispo

From: John J. Gorman, CLU
Senior Regional Director

Date: October 30, 1989

Subject: Agreements



As per our telephone conversation today, we agreed to the following:

1. Your office manager will stay for two weeks on Guardian payroll to close the books.

2. We will continue a clerical and 1/2 on our payroll after November 1, 1989.

3. We agree to a four month space lease for approximately two thousand square feet for $1.25 per square feet per month.

Please add extra charge for equipmental usage ie; telephone, copier, postage machine, etc.

4. You can put your personal production with any agency that has San Luis Obispo County as its territory.

JJG/jd

cc: Richard Neumann
Tim Lavey
Frances LiVigni

PS: It is confirmed I will see you at 2:00 pm in San Luis Obispo, November 2, 1989.

/s/ J Gorman

Thank you for this confirmation

[Proof Of Service Omitted In Printing]

---

ROBERT A. DOLINKO (Bar No. 76256)
JAMES A. NAPOLI (Bar No. 131968)
EPSTEIN BECKER & GREEN
Four Embarcadero Center, Suite 2000
San Francisco, CA 94111-5954
Telephone: (415) 398-3500

Attorneys for Defendants
THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, GUARDIAN INSURANCE AND ANNUITY COMPANY, and GUARDIAN INVESTOR SERVICES CORPORATION

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| MATT T. KOKKONEN and JEAN KOKKONEN,<br><br>Plaintiffs,<br><br>v.<br><br>THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, GUARDIAN INSURANCE AND ANNUITY CORPORATION, GUARDIAN INVESTOR SERVICES CORPORATION, and DOES 1 through 20, inclusive,<br><br>Defendants. | No. CVF 90 325 REC<br><br>DEFENDANTS' ANSWER TO PLAINTIFF'S FIRST AMENDED COMPLAINT |

Defendants The Guardian Life Insurance Company of America, the Guardian Insurance and Annuity Corporation, and the Guardian Investor Services Corporation



("defendants") answer plaintiff's Matt T. Kokkonen's First Amended Complaint, dated August 14, 1990 ("Complaint"), as follows:

1. Answering paragraph 1 of the Complaint, the answering defendants are without knowledge or information sufficient to form a belief as to the allegations contained therein, and basing their denials on that ground, deny each and every allegation contained in said paragraph.

2. Answering paragraph 2 of the Complaint, the answering defendants deny that the Guardian Investor Services Corporation is a citizen of the State of New York. Except as so denied, the answering defendants admit the remaining allegations in said paragraph.

3. Answering paragraph 3 of the Complaint, the answering defendants admit the allegations contained in said paragraph.

4. Answering paragraph 4 of the Complaint, the answering defendants deny that the effective date of the Agreement of General Agency ("Agreement") contract is March 16, 1975. Except as so denied, answering defendants admit the allegations contained in said paragraph.

5. Answering paragraph 5 of the Complaint, the answering defendants admit that the Agreement recites that plaintiff was an independent contractor and admit that defendants enrolled plaintiff in group health, disability and retirement plans. Except as so admitted, answering defendants deny each and every remaining allegation in said paragraph.

6. Answering paragraph 6 of the Complaint, the answering defendants deny each and every allegation in said paragraph.

7. Answering paragraph 7 of the Complaint, the answering defendants admit defendant Guardian Life Insurance Company of America gave notice of the cancellation of the Agreement on or about September 28, 1989 and that a copy of that notice is attached to the Complaint as Exhibit 3. Except as so admitted, answering defendants deny each and every remaining allegation in said paragraph.

8. Answering paragraph 8 of the Complaint, the answering defendants deny each and every allegation in said paragraph.

9. Answering paragraph 9 of the Complaint, the answering defendants deny each and every allegation in said paragraph.

10. Answering paragraph 10 of the Complaint, the answering defendants deny each and every allegation in said paragraph.

11. Answering paragraph 11 of the Complaint, the answering defendants deny each and every allegation in said paragraph.

12. Answering defendants do not answer the allegations contained in paragraphs 12 and 13 of the Complaint because the Court granted defendants' Motion to Dismiss the first cause of action without leave to amend.

13. Answering paragraph 14 of the Complaint, which incorporates by reference paragraphs 1 through 11 of the Complaint, the answering defendants incorporate



herein by reference paragraphs 1 through 11 of this Answer as though set forth in full.

14. Answering paragraph 15 of the Complaint, the answering defendants deny each and every allegation contained in said paragraph.

15. Answering paragraph 16 of the Complaint, the answering defendants deny each and every allegation contained in said paragraph.

16. Answering paragraph 17 of the Complaint, which incorporates by reference paragraphs 1 through 11 of the Complaint, the answering defendants incorporate herein by reference paragraphs 1 through 11 of this Answer as though set forth in full.

17. Answering paragraph 18 of the Complaint, the answering defendants admit that they have notified their policyholders that plaintiff Matt Kokkonen is no longer an agent of The Guardian and that any questions The Guardian's policyholders might have should be directed to other agents. Except as so admitted, answering defendants deny each and every remaining allegation in said paragraph.

18. Answering paragraph 19 of the Complaint, the answering defendants duly informed all the proper state authorities that defendant Guardian Life Insurance Company of America's Agency Agreement with Matt Kokkonen had been terminated. Except as so admitted, answering defendants deny each and every remaining allegation in said paragraph.

19. Answering paragraph 20 of the Complaint, the answering defendants deny each and every allegation in said paragraph.

20. Answering defendants do not answer paragraphs 21 through 23, inclusive, of the Complaint because the Court granted defendants' Motion to Dismiss this cause of action without leave to amend.

21. Answering paragraph 24 of the Complaint, which incorporates by reference paragraphs 1 through 11 of the Complaint, the answering defendants incorporate herein by reference paragraphs 1 through 11 of this Answer as though set forth in full.

22. Answering paragraph 25 of the Complaint, the answering defendants deny each and every allegation contained in said paragraph.

23. Answering paragraph 26 of the Complaint, the answering defendants admit that they took possession of the premises and paid one month's rental to plaintiff and then left the premises. Except as so admitted, answering defendants deny each and every remaining allegation in said paragraph.

24. Answering paragraph 27 of the Complaint, the answering defendants deny that they are now liable to plaintiff in the sum of Six Thousand Dollars ($6,000) plus rentals attributed to equipment which was also leased by defendants. Furthermore, as to each and every remaining allegation in said paragraph, defendants are without knowledge or information sufficient to form a belief as to the allegations contained therein, and basing their denials



on that ground, deny each and every remaining allegation in said paragraph.

25. Answering paragraph 28 of the Complaint, which incorporates by reference paragraphs 1 through 11 of the Complaint, the answering defendants incorporate herein by reference paragraphs 1 through 11 of this Answer as though set forth in full.

26. Answering paragraph 29 of the Complaint, the answering defendants deny that they wrongfully and without good or reasonable cause denied the existence of the said commercial rental agreement and cited as their basis for doing so the fact that said commercial rental agreement was not in writing. Except as so denied, answering defendants are without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 29, and basing their denials on that ground, deny each and every remaining allegation in said paragraph.

27. Answering paragraph 30 of the Complaint, the answering defendants deny each and every allegation in said paragraph.

## AFFIRMATIVE DEFENSES

As separate and affirmative defenses to plaintiff's Complaint, and each cause of action, claim and allegation contained therein, the answering defendants allege as follows:

FIRST AFFIRMATIVE DEFENSE

28. Neither the Complaint nor any cause of action therein states facts sufficient to state a cause of action against the defendants.

SECOND AFFIRMATIVE DEFENSE

29. The Complaint and each and every cause of action allegedly set forth therein is uncertain.

THIRD AFFIRMATIVE DEFENSE

30. Any alleged contract is unenforceable on the grounds that it is in violation of the statute of frauds.

FOURTH AFFIRMATIVE DEFENSE

31. Plaintiff is estopped by his conduct from asserting any of his claims against defendants.

FIFTH AFFIRMATIVE DEFENSE

32. Plaintiff has failed to mitigate his purported damages.

SIXTH AFFIRMATIVE DEFENSE

33. Plaintiff is barred from recovery under the doctrine of unclean hands.



SEVENTH AFFIRMATIVE DEFENSE

34. Plaintiff's Complaint fails to state a claim for relief upon which compensatory damages may be awarded.

EIGHTH AFFIRMATIVE DEFENSE

35. Plaintiff's Complaint fails to state a claim for relief upon which attorneys' fees may be awarded.

NINTH AFFIRMATIVE DEFENSE

36. Plaintiff's claims are barred by the applicable statute of limitations.

TENTH AFFIRMATIVE DEFENSE

37. Plaintiff is barred from recovery of punitive damages because an award of indeterminate punitive damages violates due process.

ELEVENTH AFFIRMATIVE DEFENSE

38. Plaintiff is barred from recovery of punitive damages because an award of indeterminate punitive damages is cruel and unusual punishment and is therefore prohibited by the Eighth Amendment of the United States Constitution.

TWELFTH AFFIRMATIVE DEFENSE

39. Plaintiff's Complaint fails to state a cause of action upon which punitive or exemplary damages may be awarded.

THIRTEENTH AFFIRMATIVE DEFENSE

40. Plaintiff is barred from recovery under the doctrine of laches.

FOURTEENTH AFFIRMATIVE DEFENSE

41. Plaintiff has frustrated the performance of any alleged contract and/or lease.

WHEREFORE, defendants herein pray for judgment as follows:

1. That plaintiff take nothing by reason of his Complaint on file herein;

2. That plaintiff receive no equitable relief by reason of his Complaint on file herein;

3. That said defendants be dismissed and have judgment entered in their favor;

4. That said defendants have judgment for costs of suit incurred herein;

5. That said defendants have judgment of attorneys' fees incurred herein; and



6. For such other and further relief as the Court may deem just and proper.

Dated: December 6, 1990

EPSTEIN BECKER & GREEN

By /s/ James A. Napoli
James A. Napoli
Attorneys for Defendants
THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, GUARDIAN INSURANCE AND ANNUITY COMPANY, and GUARDIAN INVESTOR SERVICES CORPORATION

[Proof Of Service Omitted In Printing]

ROBERT A. DOLINKO (Bar No. 76256)
JAMES A. NAPOLI (Bar No. 131968)
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Attorneys for Defendants
THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, GUARDIAN INSURANCE AND ANNUITY COMPANY, and GUARDIAN INVESTOR SERVICES CORPORATION and for Counter-claimant THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| MATT T. KOKKONEN and JEAN KOKKONEN,<br>Plaintiffs,<br>v.<br>THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, GUARDIAN INSURANCE AND ANNUITY CORPORATION, GUARDIAN INVESTOR SERVICES CORPORATION, and DOES 1 through 20, inclusive,<br>Defendants. | No. CVF 90 325 REC<br>DEFENDANT THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA'S COUNTERCLAIM FOR CONVERSION AND UNFAIR COMPETITION<br>JURY TRIAL DEMANDED<br>(Filed April 22, 1991) |



| | |
|---|---|
| THE GUARDIAN LIFE INSURANCE COMPANY, OF AMERICA,<br>Counter-Claimant,<br>vs.<br>MATT T. KOKKONEN,<br>Counter-Defendant. | |

Counter-claimant the Guardian Life Insurance Company of America alleges:

1. The Guardian Life Insurance Company of America ("The Guardian") is a corporation incorporated under the laws of the State of New York with its principal place of business in the State of New York.

2. Counter-defendant Matt T. Kokkonen ("counter-defendant") is and was at all relevant times mentioned herein a citizen of the State of California. The jurisdiction of this court of the subject mater of this action is predicated on 28 U.S.C. §1332. The matter in controversy exceeds $50,000 exclusive of interest and costs.

3. Counter-defendant resides in this district and the claim arose in this district.

FIRST CLAIM FOR RELIEF FOR CONVERSION

4. At all times herein mentioned, The Guardian was and still is, the owner and entitled to the possession of its agency files in connection with its insurance policyholders. Counter-defendant, Matt. T. Kokkonen, took the above-mentioned property from The Guardian's possession and converted the same to his own use.

5. Counter-defendant's First Amended Complaint incorporates by reference the general agency contract between counter-defendant and The Guardian which expressly provides at Section 1(B)(6) that: "All books and records kept by the Principal in connection with the business of the Company are the property of the company and shall be returned on demand."

6. Counter-defendant had a right to access said property only as a general agent of The Guardian. Counter-defendant's right to access of the property was terminated in October 1989 when the Guardian terminated its agency agreement with counter-defendant.

7. On or about November 1, 1989 The Guardian demanded the immediate return of the agency files in connection with The Guardian's policyholders. Counter-defendant returned some of the agency files and represented that he did not possess any other agency files. However, on March 7, 1991, counter-defendant testified under oath that he still possessed approximately 200 of the agency files.

8. When requested to return the approximately 200 files, counter-defendant failed and refused to do so and continues to fail and refuses to return the agency files to The Guardian.

9. As a proximate result of counter-defendant's conversion, The Guardian suffered financial injuries which are the natural, reasonable and proximate result of the conversion, all to The Guardian's damage in a sum not yet determined but certainly well over $50,000.



10. Between the time of defendant's conversion of the above-mentioned property to his own use and the filing of this action, The Guardian has expended a great deal of time and money to obtain the information contained in said agency files all to The Guardian's further damage in an amount to be determined at trial.

11. The aforementioned acts of counter-defendant were wilful, wanton, malicious and oppressive and were undertaken with the intent to defraud and justify the awarding of exemplary and punitive damages in the amount to be determined at trial.

## SECOND CLAIM FOR RELIEF FOR UNFAIR COMPETITION

12. The Guardian incorporates herein by reference paragraphs 1 through 3 of this counterclaim as though set forth in full.

13. The Guardian Life Insurance Company of America possesses a valid, protectable proprietary interest in its tradename "The Guardian."

14. Subsequent to the termination of counter-defendant's agency contract in 1989, counter-defendant has used and continues to use The Guardian's tradename.

15. Specifically, counter-defendant has distributed and continues to distribute advertisement leaflets which improperly use The Guardian's tradename and create the false impression that counter-defendant is an agent of The Guardian and continues to be an agent of The Guardian even though counter-defendant is no longer an agent

of The Guardian and has no right to use The Guardian tradename.

16. Attached hereto as Exhibit "A" and incorporated herein by reference is a true and correct copy of the false advertisement leaflet counter-defendant has distributed in the San Luis Obispo community.

17. The aforementioned acts of counter-defendant were wilful, wanton, malicious and oppressive and were undertaken with the intent to defraud and justify the awarding of exemplary and punitive damages in an amount to be determined at trial.

18. As a proximate result of counter-defendant's improper use of The Guardian tradename, The Guardian has suffered financial injuries which are the natural, reasonable and proximate result of the improper use by counter-defendant of The Guardian's tradename, all to The Guardian's damage in the sum not yet determined but certainly well in excess of $50,000.

WHEREFORE, The Guardian prays for judgment against counter-defendant as follows:

1. For monetary judgment representing compensatory damages together with interest on these amounts, according to proof;

2. For a judgment which orders counter-defendant to return The Guardian's agency files;

3. For a judgment that orders counter-defendant to cease and desist from infringing upon The Guardian's tradename and associating himself with The Guardian;



4. For an award of punitive damages, according to proof;

5. For costs of suit and attorneys' fees;

6. For pre-judgment and post-judgment interest; and

7. For such other and further relief as the Court deems just and proper.

DATED: April 19, 1991

EPSTEIN BECKER MULKEEN & GREEN

By /s/ James A. Napoli
James A. Napoli
Attorneys for Defendants THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, GUARDIAN INSURANCE AND ANNUITY COMPANY, and GUARDIAN INVESTOR SERVICES CORPORATION and Counter-claimant THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA

EXHIBIT "A"

**[Logo] The Guardian**

**Guardian Financial Services**

1103 Johnson Avenue – San Luis Obispo, CA 93401
805/541-1880

FINANCIAL PLANNING

PERSONAL ESTATE PLANNING

- Life Insurance
- Health Insurance
- Disability Income Insurance
- Mortgage Insurance
- Retirement Plans & IRA's

BUSINESS PLANNING

- Pension and Profit Sharing Plans
- Group Health and Life Insurance
- Business Buy/Sell Planning
- Business Liquidity

SECURITIES INVESTMENTS

- Mutual Funds
- Tax Shelters
- Real Estate Limited Partnerships

[Photo Omitted In Printing]

MATT KOKKONEN, C.L.U.
Chartered Financial Consultant

MEMBER:
AMERICAN SOCIETY OF CHARTERED LIFE
UNDERWRITERS MILLION DOLLAR ROUND TABLE
GISC-MEMBER OF NATIONAL ASSOCIATION OF
SECURITIES DEALERS, INC.

For Information & Assistance on
Financial Matters . . . Call



**[Logo] The Guardian**

MATT KOKKONEN, C.L.U., CHFC
1103 Johnson Avenue, San Luis Obispo, CA 93401
(805) 541-1880

Financial Planning
Estate Planning
Pension/Profit Sharing Plans
Securities Investments
Life, Disability, Health &
Group Insurance

Name: _____
Address: _____ Phone: _____

[Proof Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFONRIA [sic]
HON. ROBERT E. COYLE, JUDGE

| | | |
|---|---|---|
| MATT T. KOKKONEN,<br>Plaintiff,<br>vs.<br>GUARDIAN LIFE INSURANCE COMPANY,<br>Defendant. | ) | JURY TRIAL<br>NO. CV-90-325-REC |

Fresno, California
Thursday, March 5, 1992

REPORTER'S PARTIAL TRANSCRIPT

APPEARANCES:

For the Plaintiff:
RICHARD B. ISHAM
Attorney at Law
2902 West Main Street
Visalia, California 93291

For the Defendant:
EPSTEIN, BECKER & GREEN
Attorneys at Law
111 Pine Street, Ste. 1200
San Francisco, California
94111-5614
BY: JAMES A. NAPOLI
ROBERT A. DOLINKO

Reported by: TRACI A. ROLDAN, CSR# 7566, RPR, CM



[p. 2] Thursday, March 5, 1992 Fresno, CA

(Whereupon, the following proceedings were held in chambers:)

THE COURT: Record will reflect we're in session in chambers out of the presence of the jury.

I understand the matter's been resolved and that the parties wish to put it on the record; is that correct?

MR. NAPOLI: That's correct, your Honor.

THE COURT: Who wishes to make the statement for the record resolved and go from there?

MR. DOLINKO: I will do my best to do that, your Honor. Case is settling under the following conditions.

There will be mutual dismissal with prejudice of all claims by both sides. With respect to the unfair competition claim by the Guardian against Mr. Kokkonen, it's understood that the dismissal of that claim with prejudice at this time would not in any way have any impact if Mr. Kokkonen were to engage in any form of unfair competition after today.

With respect to the payment of the court reporter, who did a wonderful job, we are going to split the per diem fee there.

It's further agreed that Mr. Kokkonen is [p. 3] not going to be sending any forms, either from himself, or be providing his quote, unquote, "clients" with any forms in order for him to request information from the Guardian. Of course, if a client of the Guardian has a request for

information and puts it on their own letterhead or whatever other way they have of communicating a request for information, they're free to do so, and we will respond – the Guardian will respond to that particular quote, unquote client. Any requests for information about Guardian policyholders who are serviced out of the San Luis Obispo agency are to go to the San Luis Obispo agency. The response will go to the policyholders.

Mr. Kokkonen, to the extent he has any Guardian files or files containing information regarding Guardian policyholders, will turn over those files, but he will be allowed to copy them and retain those copies for his own records, whatever he has now.

Mr. Kokkonen will pay the Guardian ten dollars, and I believe that's –

MR. ISHAM: We had this understanding – excuse me. We had reached an informal understanding that was not gonna be discussed or disseminated, the results of this settlement, in the community by any of the parties or members of the San Luis Obispo agency. It's a [p. 4] sensitive thing.

MR. DOLINKO: That's correct, there's an informal gentleman's agreement to that effect, but it is not in a strict sense a formal part of the settlement.

MR. ISHAM: A question has been raised, and that is on this client request for information, there are standard industry forms that are issued by what, American College, things like that.



MR. KOKKONEN: From a practical standpoint, the Guardian uses forms on the back of many of their factfinders –

THE COURT: Well, let's not get in discussion. I must say I was confused with what it was you agreed to or agreed not to do in request for information.

MR. NAPOLI: There's been a problem that Mr. Kokkonen writes letters and requests at times voluminous amounts of information. The policyholder is contacted and they don't even know what's going on. They just signed something that's put in front of 'em, and, basically, what we understood this agreement to be is that he no longer uses form letter requesting information, and that if a policyholder wants information, they should just do so by themselves without Mr. Kokkonen writing the letters and using his [p. 5] letterhead and things of that nature.

MR. DOLINKO: In other words –

THE COURT: That's fine with me. I just want to make sure if I don't understand it, I don't know what –

MR. ISHAM: So what is the arrangement, he can't use his letterhead?

MR. DOLINKO: Any requests or –

THE COURT: Let's be practical about this. I'm a policyholder of Mr. Kokkonen and I go in and I say, "What can I do about this," and the answer is you'll have to get the information from the Guardian. If there's a specific form to do that, he can't furnish the form to the policyholder?

MR. NAPOLI: They don't have a specific form. The form we're talking about –

THE COURT: My point is what is the policyholder to do?

MR. DOLINKO: Simply make the request on their own stationery or pick up the telephone.

THE COURT: There's no question Mr. Kokkonen can tell them write in and give these three things and talk about it.

MR. DOLINKO: That's permissible.

THE COURT: Mr. Kokkonen, I'm not trying to do [p. 6] anybody's business. I'm just trying to get this straight, and it makes sense and that you can all live with I don't see you all back here in the future.

MR. ISHAM: Amen.

MR. KOKKONEN: May I address that point, sir?

THE COURT: Well, all right.

MR. KOKKONEN: I'm also a practical person, and when I go see – if I were to come to and ask or we're doing business and we want information on your policies, it's hard for you to start composing a letter, I want this dividend option and I want this dividend option. I have standard forms that I've used for years –

THE COURT: I'm not gonna try –

MR. KOKKONEN: – try to avoid creating a problem.



THE COURT: I must try and find out what you people agreed to do.

MR. ISHAM: You can do that on plain, non Kokkonen letterhead is what you're saying.

THE COURT: What it's gonna require, as I understand it, is that you're gonna have to give your policyholder whatever information it is that you need and the policyholder asks the Guardian for it and gets it. Whether this is all, you know – best way to go [p. 7] about doing business for everybody, that's not my concern. My concern is you all understand what you've agreed to, and the reason I brought one practical matter up, I could see it was gonna be a problem if you didn't get it resolved here and now.

MR. KOKKONEN: I'm trying to avoid that problem, and, realistically, that is an extreme burden, an extreme practical burden, because when I go to a client's house, it is so much easier and faster for me to use just a white piece of paper on which I've Xeroxed certain boxes that he can check off.

MR. DOLINKO: That's exactly what we're trying to avoid the use of, because let me just explain briefly, because we get numerous of these forms in from clients of Mr. Kokkonen, and when the client is contacted, the client doesn't even know what we're talking about when our agency asks.

THE COURT: You know –

MR. DOLINKO: I know –

THE COURT: – you people do as you want. I don't think you have the case settled, and we'll just have to present it to the jury. I have to tell you –

MR. ISHAM: I was hoping we did, quite honestly, because we've come a long way to this stage.

THE COURT: I understand that, but it seems to [p. 8] me that somewhere along the line the policyholder is being left out in the cold as to who properly wants to get something done, wants to get it done.

MR. NAPOLI: We agree, your Honor, and we've always given the information to the policyholder. The problem we're trying to resolve through a settlement is that sometimes the information requested is eight cartons of things.

THE COURT: If you don't settle this aspect of it here, it's gonna be settled some other way. You're all gonna walk away from here.

MR. ISHAM: This is our best chance.

THE COURT: Seems to me there's gotta be an easy way of assuming that the policyholder truly wants something, they can know what it is they want and be able to get it.

MR. DOLINKO: What if we agree that any requests for information will be submitted from the policyholder only to the Guardian in good faith?

MR. ISHAM: That's fine.

MR. KOKKONEN: In good faith – yeah, good.



MR. DOLINKO: Just simply that agreement. Is that okay, that any submission of information will be in good faith – I'm sorry, any request for information will be submitted by the policyholder in good faith.

[p. 9] If it's so advised by Mr. Kokkonen, in other words, Mr. Kokkonen will be acting – agreed he will act on good faith.

MR. ISHAM: All parties, the good faith standard, the request and fulfilling.

THE COURT: I don't want to see you people come back here to have the agreement enforced. I don't want to see anybody fooling around, that's all I can say.

MR. DOLINKO: Is that acceptable?

THE COURT: You all have better things to do than worry about coming back here.

MR. NAPOLI: Is that acceptable?

MR. KOKKONEN: If I understand what it was – maybe it could be read back to me, the last statement.

MR. ISHAM: My impression is that this part of the agreement is of concern to the Guardian because they feel that you can become abusive in your requesting of information; is that right?

MR. NAPOLI: That's correct.

MR. DOLINKO: Right.

MR. ISHAM: Regardless of whether there's merit to that position, that's their concern. The way to solve the problem is to import the good faith requirement

on the requests. That would allow you to use your existing forms, as long as they're submitted [p. 10] in good faith.

THE COURT: And if the submission is actually by the policyholder, as I understand it.

MR. DOLINKO: That is correct.

MR. KOKKONEN: I don't understand that. I don't understand what you're saying by that.

MR. NAPOLI: You can't write the letter yourself. The policyholder can pick up the phone and the policyholder can write the letter, and if you're advising the policyholder and you're requesting the information, it has to be a good faith reason for the request.

MR. DOLINKO: That's all.

MR. ISHAM: But he can use his existing forms to check a box.

MR. NAPOLI: Not that form letter.

MR. KOKKONEN: If a policyholder signs the form, then he has authorized the –

THE COURT: All you people are doing is building a new lawsuit. Let's let the jury decide this one. You know, this –

MR. KOKKONEN: I'm certainly trying to avoid it, and I don't understand the problem, why you're throwing that issue at all into it. I didn't know that it was even a bone of contention on that matter.

[p. 11] MR. DOLINKO: Can't we simply agree that, Mr. Kokkonen, you will act in good faith in advising



a policyholder to request information from the Guardian? Is that fair?

MR. ISHAM: Yes, we can agree to that.

MR. DOLINKO: That's it.

MR. ISHAM: I mean if we can't, then you've lost your lawyer.

THE COURT: If you can't, there's something fishy somewhere.

MR. DOLINKO: The request comes from a policyholder, we've agreed on that, and Mr. Kokkonen suggests that the policyholder makes a request of the Guardian, that suggestion will be made and only in good faith. That's all.

MR. KOKKONEN: You're saying I cannot request any information from the Guardian? That seems strange.

THE COURT: Mr. Kokkonen, it's quite obvious the case is not gonna get settled.

MR. ISHAM: You want to –

MR. KOKKONEN: Yes, I do.

MR. ISHAM: – work our way through all these things.

THE COURT: If you – if a policyholder's information is going to be requested, it's going to be [p. 12] requested by the policyholder. If you're giving advice to the policyholder, it'll be done in good faith, and that's it. If it's hard to understand –

MR. KOKKONEN: That's a good statement, sir. I can accept that.

MR. ISHAM: Okay. Then the only other point that is not a big point is when does this turnover of the last remaining so many files physically in the trunk of the car out here get turned over?

MR. DOLINKO: By March 31, 1992.

MR. ISHAM: Fair enough. And to where, San Luis Obispo office?

MR. DOLINKO: Yes, at a time to be mutually agreed upon between you, Mr. Isham, and I, or Mr. Napoli.

MR. NAPOLI: And it's understood – just wanted to add that the information will be –

MR. KOKKONEN: Don't add any more.

MR. NAPOLI: The information will be sent to the policyholder directly.

MR. DOLINKO: That's been established.

MR. ISHAM: We have an agreement.

THE COURT: Okay.

MR. ISHAM: Thanks –

MR. NAPOLI: Judge, do you understand the [p. 13] agreement? I just wanted to have one party not involved in this making sure that the judge understood the agreement.

THE COURT: Oh, I understand.



MR. DOLINKO: Thank you, your Honor. We appreciate it.

THE COURT: We will go out and let the jury know their work is over. Do you wish to all be in the courtroom when the announcement is made to the court, or would you rather –

MR. DOLINKO: Hide.

MR. ISHAM: Do you think they'll throw something?

MR. DOLINKO: Your Honor, would it be appropriate for us to ask the jurors what they think afterwards?

THE COURT: I don't have any problem. I will tell them that the admonition is lifted, they can speak to whoever they wish, but the choice is theirs, so I don't – there might be certain cases I wouldn't allow that to happen.

MR. DOLINKO: Thank you, your Honor.

THE COURT: None of you may want to know.

(Whereupon, the in chambers proceedings were concluded, and proceedings were held in open court.)

[p. 14]

STATE OF CALIFORNIA )
) SS.
COUNTY OF TULARE )

I, TRACI A. ROLDAN, Certified Shorthand Reporter, DO HEREBY CERTIFY:

That I was present at the time of the Proceedings in the case as entitled on the title page thereof; that I took down in shorthand all of the testimony given and proceedings had. I further certify that the foregoing and annexed pages numbered 1 to 13, both inclusive, comprise a full, true and correct transcript of my shorthand notes reduced by computer under my supervision.

Dated: April 5, 1992, at Visalia, California.

/s/ Traci A. Roldan
TRACI A. ROLDAN,
CSR# 7566

---



JAMES A. NAPOLI (Bar No. 131968)
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San Francisco, California 94111-5614
Telephone: (415) 398-3500

Attorneys for Defendants
THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, THE GUARDIAN INSURANCE AND ANNUITY COMPANY, and THE GUARDIAN INVESTOR SERVICES CORPORATION and for Counter-Claimant THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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|---|---|
| MATT T. KOKKONEN and JEAN KOKKONEN,<br><br>Plaintiffs,<br><br>v.<br><br>THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, THE GUARDIAN INSURANCE AND ANNUITY CORPORATION, THE GUARDIAN INVESTOR SERVICES CORPORATION, and DOES 1 through 20, inclusive,<br><br>Defendants. | No. CVF 90 325 REC<br><br>STIPULATION AND ORDER OF DISMISSAL WITH PREJUDICE |

THE GUARDIAN LIFE INSURANCE COMPANY, OF AMERICA,

Counter-Claimant,

vs.

MATT T. KOKKONEN,

Counter-Defendant.

IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, through their undersigned attorneys, that plaintiff's entire Complaint against defendant The Guardian Life Insurance Company of America herein be, and the same hereby is, dismissed with prejudice, without costs or attorneys' fees in favor of any party against the other.

IT IS HEREBY FURTHER STIPULATED AND AGREED, that defendant The Guardian Life Insurance Company of America's entire cross-complaint against plaintiff herein be, and the same hereby is, dismissed with prejudice, without costs or attorneys' fees in favor of any party as against the other.



Dated: April 1, 1992 EPSTEIN BECKER & GREEN

By: /s/ James A. Napoli
James A. Napoli
Attorneys for Defendants THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, THE GUARDIAN INSURANCE AND ANNUITY COMPANY, and THE GUARDIAN INVESTOR SERVICES CORPORATION and for Counter-Claimant THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA

Dated: April 4, 1992 LAW OFFICES OF RICHARD B. ISHAM

By: /s/ Richard B. Isham
Richard B. Isham
Attorneys for Plaintiff and Cross-Defendant MATT T. KOKKONEN

IT IS SO ORDERED.

Dated: 4/13/92 /s/
U.S. DISTRICT JUDGE

ROBERT A. DOLINKO (Bar No. 76256)
JAMES A. NAPOLI (Bar No. 131968)
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| MATT T. KOKKONEN and JEAN KOKKONEN,<br><br>Plaintiffs,<br><br>v.<br><br>THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, THE GUARDIAN INSURANCE AND ANNUITY CORPORATION, THE GUARDIAN INVESTOR SERVICES CORPORATION, and DOES 1 through 20, inclusive,<br><br>Defendants. | No. CVF 90 325 REC<br><br>NOTICE OF MOTION AND MOTION TO ENFORCE SETTLEMENT AGREEMENT AND SANCTIONS<br><br>Date: June 29, 1992<br>Time: 1:30 p.m.<br>Place: Dept. 1 |



| | |
|---|---|
| THE GUARDIAN LIFE INSURANCE COMPANY, OF AMERICA,<br><br>Counter-Claimant,<br><br>vs.<br><br>MATT T. KOKKONEN,<br><br>Counter-Defendant. | |

TO PLAINTIFF IN PRO PER MATT T. KOKKONEN:

PLEASE TAKE NOTICE that on June 29, 1992 at 1:30 p.m. in Courtroom 1 of the above-captioned Court, which is located at U.S. Courthouse Building, 1130 "O" Street, Fresno, California 93721, defendant The Guardian Life Insurance Company of America will move and hereby does move to enforce the settlement agreement in the above-referenced action, and for sanctions.

The Guardian bases this motion on the grounds that Matt Kokkonen has failed to comply with the settlement agreement entered into on March 6, 1992, and that his failure to comply has been in bad faith.

This motion is based on this Notice of Motion and Motion, Defendant's Memorandum of Points and Authorities filed and served herewith, the Declaration of Carl Hagmaier filed and served herewith, the Declaration of Dennis d'Autremont filed and served herewith, the Declaration of James A Napoli filed and served herewith, the pleadings on file in this action, and such further argument as may be presented at the hearing of this motion.

Dated: May 20, 1992 Respectfully submitted,

EPSTEIN BECKER & GREEN

By: /s/ James A. Napoli
James A. Napoli
Attorneys for Defendants
THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, THE GUARDIAN INSURANCE AND ANNUITY COMPANY, and THE GUARDIAN INVESTOR SERVICES CORPORATION and for Counter-Claimant THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA

[Proof Of Service Omitted In Printing]

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| MATT T. KOKKONEN and JEAN KOKKONEN,<br><br>Plaintiffs,<br><br>v.<br><br>THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, THE GUARDIAN INSURANCE AND ANNUITY CORPORATION, THE GUARDIAN INVESTOR SERVICES CORPORATION, and DOES 1 through 20, inclusive,<br><br>Defendants. | No. CVF 90 325 REC<br><br>DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO ENFORCE SETTLEMENT AGREEMENT AND SANCTIONS<br><br>Date: June 29, 1992<br>Time: 1:30 p.m.<br>Place: Dept. 1 |

THE GUARDIAN LIFE INSURANCE COMPANY, OF AMERICA,

Counter-Claimant,

vs.

MATT T. KOKKONEN,

Counter-Defendant.

## I. INTRODUCTION

The above-captioned action was tried in this Court before the Honorable Robert E. Coyle on March 3 through March 6, 1992. After closing arguments, but before the jury began deliberations, the parties agreed to settle the action. In the presence of Judge Coyle, the parties, and counsel for the parties, the terms of the settlement agreement were stated on the record. An important term of the settlement agreement was that plaintiff Matt Kokkonen would return to defendant The Guardian Life Insurance Company of America ("The Guardian") certain files. The parties agreed as follows:

MR. DOLINKO: Mr. Kokkonen, to the extent he has any Guardian files or files containing information regarding Guardian policyholders, will turn over those files. . . .

(Settlement transcript at Napoli Decl., Exh. B, 3:14-17). The parties further agreed as follows:

MR. ISHAM: Okay. Then the only other point that is not a big point is when does this turnover of the



last remaining so many files physically in the trunk of the car out here get turned over?

MR. DOLINKO: By March 31, 1992.

MR. ISHAM: Fair enough. And to where, San Luis Obispo office?

MR. DOLINKO: Yes, at a time to be mutually agreed upon between you, Mr. Isham, and I, or Mr. Napoli.

(Settlement transcript at Napoli Decl., Exh. B., 12:6-15). Subsequently for the convenience of all the parties, it was agreed that Mr. Kokkonen would turn over all the files on or before April 6, 1992. (Napoli Decl., ¶ 4).

On April 6, 1992, Mr. Kokkonen delivered only terminated group files. He failed to deliver any individual life insurance policy files or any individual disability insurance files. (Decls. of Hagmaier and d'Autremont). Subsequently, Mr. Kokkonen was asked on three separate occasions to return the remaining files. On the first occasion, Mr. Kokkonen did not respond to a letter sent to his counsel on April 7, 1992. (Napoli Decl. ¶¶ 6-8). On the second occasion Mr. Kokkonen did not respond to a letter dated April 16, 1992 which was sent directly to him. (Napoli Decl. ¶ 8).[1] Finally, on the last occasion Mr. Kokkonen refused to cooperate with a request made over the telephone by Dennis d'Autremont. When Mr. d'Autremont requested that Mr. Kokkonen return the individual life insurance policy files and the individual

[1] Mr. Isham, counsel for Mr. Kokkonen, ceased representing Mr. Kokkonen on or about April 8, 1992. (Napoli Decl. ¶ 7).

disability insurance files, Mr. Kokkonen simply said that he would give him absolutely no information. (d'Autremont Decl. at ¶ 3.)

Mr. Kokkonen has never denied the fact that he has individual policyholder files in connection with The Guardian's policyholders. Indeed, Mr. Kokkonen admitted both at trial and at deposition that he had individual policyholder files. At trial he admitted that he authored a form letter which he sent to hundreds of individual Guardian policyholders that stated unequivocally "I have your files." Mr. Kokkonen further admitted that he did in fact possess the files of many individuals to whom he sent this form letter. (Napoli Decl. at ¶ 5). Furthermore, at deposition, Mr. Kokkonen testified as follows:

QUESTION [by Mr. Napoli]: Do you have any Guardian agency files in your possession?

ANSWER [by Mr. Kokkonen]: Would you explain your question a little more, please.

Q.: The agency files in connection with Guardian policyholders, do you have any of those files in your possession?

A.: Yes.

Q.: Which one if you remember? Well, let me put it this way: more than one?

A.: Yes.

Q.: Approximately how many?

A.: That's very hard for me to say, but perhaps I can say a couple of hundred right off the top of my head.



Q.: Okay, that's your best estimate?

A.: At this time.

Q.: Okay, that's fair enough. Subsequent to your termination as a general agent of The Guardian, did you deny Guardian agents access to agency files . . .

A.: Yes.

Q.: . . . of Guardian policyholders?

A.: I denied them unlimited access to client files in my agency, to my agency files.

Q.: And those agency files are regarding Guardian policyholders?

A.: Yes.

(Kokkonen Deposition, 35:3-36:3 at Napoli Decl. Exhibit A.)

It is clear that Mr. Kokkonen has possessed the individual policyholder files for quite some time. Furthermore, the spirit of the settlement agreement was for Mr. Kokkonen to return these individual files. These are the files that he knows are of value to The Guardian. Mr. Kokkonen in bad faith refused to return these files. Instead, he returned group insurance files that have been terminated. These files have no value to anyone. As demonstrated below, Mr. Kokkonen should be ordered by this Court to return the individual policyholder files to The Guardian's San Luis Obispo office, and furthermore, Mr. Kokkonen should be sanctioned for engaging in bad faith conduct.

## II. ARGUMENT

### A. The Court Should Order Mr. Kokkonen to Return the Files.

In *Matter of Springpark Association. Crown Life Ins. Co. v. Springpark Associates*, 623 F.2d 1377 (9th Cir. 1980), the court held that a district court has authority to enforce settlement agreements. The *Springpark* court ruled:

> a litigant can no more repudiate a compromise agreement than he could disown any other binding contractual relationship. . . . Moreover, it is equally well settled in the usual litigation context that courts have inherent powers summarily to enforce a settlement agreement with respect to an action pending before it; the actual merits of the controversy become inconsequential. . . . The authority of a trial court to enter a judgment enforcing a settlement agreement has as its foundation the policy favoring the amicable adjustment of disputes and the concomitant avoidance of costly and time-consuming litigation.

*Id.* at 1380; *see also Dacanay v. Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978).

In the present case, Mr. Kokkonen refuses to honor the settlement agreement by returning to Guardian individual life insurance policy files and individual disability insurance policy files. In light of the foregoing authority, the Court should order Mr. Kokkonen to return the files and comply with the terms of the settlement agreement as stated on the record before Judge Coyle.



### B. Sanctions Should Be Awarded Against Mr. Kokkonen for His Deliberate Failure to Comply with the Settlement Agreement.

Mr. Kokkonen should be sanctioned by having to pay The Guardian's attorney fees incurred as a result of this motion. In *Chambers v. Nasco, Inc.*, ___ U.S. ___, 111 S.Ct. 2123, 2133 (1991) the U.S. Supreme Court held that a trial court may assess attorneys' fees when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."

In the present case, Mr. Kokkonen has acted in bad faith. He refuses to abide by the terms of the settlement agreement and return to The Guardian all its individual policyholder files. Instead, Mr. Kokkonen returned files that he understands are of no value. Furthermore, he refuses to respond to requests for the files and defiantly ignores his obligations under the agreement. In light of the foregoing authority and Mr. Kokkonen's conduct, the Court should order Mr. Kokkonen to pay The Guardian's attorneys' fees for bringing this motion.

## III. CONCLUSION

For the foregoing reasons, defendant and cross-complainant The Guardian Life Insurance Company of America respectfully requests that the Court grant its Motion to Enforce Settlement Agreement and Sanctions.

Dated: May 20, 1992 Respectfully submitted,

EPSTEIN BECKER & GREEN

By: /s/ James A. Napoli
James A. Napoli
Attorneys for Defendants
THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, THE GUARDIAN INSURANCE AND ANNUITY COMPANY, and THE GUARDIAN INVESTOR SERVICES CORPORATION and for Counter-Claimant THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| MATT T. KOKKONEN and JEAN KOKKONEN,<br><br>Plaintiffs,<br><br>v.<br><br>THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, THE GUARDIAN INSURANCE AND ANNUITY CORPORATION, THE GUARDIAN INVESTOR SERVICES CORPORATION, and DOES 1 through 20, inclusive,<br><br>Defendants. | No. CVF 90 325 REC<br><br>DECLARATION OF CARL HAGMAIER IN SUPPORT OF MOTION TO ENFORCE SETTLEMENT AGREEMENT AND SANCTIONS<br><br>Date: June 29, 1992<br>Time: 1:30 p.m.<br>Place: Dept. 1 |

THE GUARDIAN LIFE INSURANCE COMPANY, OF AMERICA,

Counter-Claimant,

vs.

MATT T. KOKKONEN,

Counter-Defendant.

I, Carl Hagmaier, hereby declare and state as follows:

1. I am a Career Development Manager for The Guardian Life Insurance Company of America. The Guardian office where I work is located at 414 Higuera Street, San Luis Obispo, California. If called upon to testify to the facts in this declaration, I could and would competently testify to the same.

2. On April 6, 1992 at approximately 4:50 p.m. I noticed Matt Kokkonen and his secretary Lisa Hyland approaching the front entrance of The Guardian's office building on Higuera Street. Ms. Hyland was carrying a cardboard box filled with files which she placed just outside the entrance of the office building and next to another cardboard box with files which had already been placed there. As Ms. Hyland approached the entrance of the building, I saw Mr. Kokkonen approximately ten feet behind her. Mr. Kokkonen did not approach the entrance of the building. After Ms. Hyland placed the box down, she requested that I sign a form stating Mr. Kokkonen had returned 275 files. I stated I could not sign the form until I first counted the files. Ms. Hyland then asked me if



I would sign the form if it was modified to state "approximately 275 files." I said I would do so. Accordingly, the form was modified and I signed it.

3. Immediately after Ms. Hyland and Mr. Kokkonen left the front of the office building, I brought the two boxes into the office and examined the files. I noticed that they were all yellow-labeled files. Our office uses yellow labels on files to distinguish them as group insurance files. Upon closer examination, I noticed all the files were in connection with terminated group insurance policies and therefore are of no real value to The Guardian.

4. I also noticed that Mr. Kokkonen had failed to return any of the individual life insurance policy files or the individual disability insurance files. It was these individual life insurance policy files and individual disability insurance files that I expected Mr. Kokkonen would return to The Guardian pursuant to the settlement reached in court.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Luis Obispo, California on May 13, 1992.

/s/ Carl Hagmaier
CARL HAGMAIER

ROBERT A. DOLINKO (Bar No. 76256)
JAMES A. NAPOLI (Bar No. 131968)
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Attorneys for Defendants
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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|---|---|
| MATT T. KOKKONEN and JEAN KOKKONEN,<br><br>Plaintiffs,<br><br>v.<br><br>THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, THE GUARDIAN INSURANCE AND ANNUITY CORPORATION, THE GUARDIAN INVESTOR SERVICES CORPORATION, and DOES 1 through 20, inclusive,<br><br>Defendants. | No. CVF 90 325 REC<br><br>DECLARATION OF DENNIS D'AUTREMONT IN SUPPORT OF MOTION TO ENFORCE SETTLEMENT AGREEMENT AND SANCTIONS<br><br>Date: June 29, 1992<br>Time: 1:30 p.m.<br>Place: Dept. 1 |



THE GUARDIAN LIFE INSURANCE COMPANY, OF AMERICA,

Counter-Claimant,

vs.

MATT T. KOKKONEN,

Counter-Defendant.

I, Dennis d'Autremont, hereby declare and state as follows:

1. I am a Career Development Manager for the Guardian Life Insurance Company of America. I work in the Guardian's office located at 414 Higuera Street, Suite A, San Luis Obispo, California 93401. If called upon to testify to the facts in this declaration, I could and would competently testify to them.

2. On April 6, 1992, I noticed that Matt Kokkonen returned certain group files to The Guardian's San Luis Obisop office and proceeded to examine the files. I noticed by their absence that he did not return either individual life insurance policy files or individual disability income files. Each of our files is color-coded. The group files are yellow labeled, and the only files Mr. Kokkonen returned were yellow labeled. The individual life insurance policy files and the individual disability income files are blue labeled. Mr. Kokkonen returned none of these files.

3. On or about April 23, 1992, I spoke to Mr. Kokkonen over the telephone. I asked Mr. Kokkonen why he did not return the individual life insurance policy files

and individual disability income files. Mr. Kokkonen said, "I gave you the files." I said, "You only gave us lapsed group files, and we want The Guardian's individual life insurance policy files and The Guardian's individual disability income files that you possess." Mr. Kokkonen responded, "I will not speak to you about this because you will distort anything I will say." I responded, "We just want The Guardian files; why won't you return them?" Mr. Kokkonen tersely responded by saying that he would give me absolutely no information.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Luis Obispo, California on May ___, 1992.

/s/ Dennis d'Autremont
DENNIS D'AUTREMONT

---



ROBERT A. DOLINKO (Bar No. 76256)
JAMES A. NAPOLI (Bar No. 131968)
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Attorneys for Defendants
THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, THE GUARDIAN INSURANCE AND ANNUITY COMPANY, and THE GUARDIAN INVESTOR SERVICES CORPORATION and for Counter-Claimant THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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| MATT T. KOKKONEN and JEAN KOKKONEN,<br><br>Plaintiffs,<br><br>v.<br><br>THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, THE GUARDIAN INSURANCE AND ANNUITY CORPORATION, THE GUARDIAN INVESTOR SERVICES CORPORATION, and DOES 1 through 20, inclusive,<br><br>Defendants. | No. CVF 90 325 REC<br><br>DECLARATION OF JAMES A. NAPOLI IN SUPPORT OF MOTION TO ENFORCE SETTLEMENT AGREEMENT AND SANCTIONS<br><br>Date: June 29, 1992<br>Time: 1:30 p.m.<br>Place: Dept. 1 |

THE GUARDIAN LIFE INSURANCE COMPANY, OF AMERICA,

Counter-Claimant,

vs.

MATT T. KOKKONEN,

Counter-Defendant.

I, James A. Napoli, hereby declare and state as follows:

1. I am an attorney at law licensed to practice before all the courts of the State of California and before the United States District Court for the Eastern District of California. My firm is counsel of record for The Guardian Life Insurance Company of America in the above-captioned action. If asked to testify to the facts in this declaration, I could and would competently testify to them.

2. On March 7, 1991, I deposed plaintiff and cross-defendant Matt Kokkonen. Attached hereto as Exhibit A is a true and accurate copy of an excerpt from the transcript of that deposition.

3. On March 6, 1992, I was in the chambers of Judge Robert Coyle when the parties agreed to a settlement on the record. The court reporter transcribed the settlement agreement. Attached hereto as Exhibit B is a true and accurate copy of that settlement agreement. As a term of the parties settlement agreement, plaintiff and cross-defendant Matt Kokkonen agreed to return all The Guardian's files in his possession to The Guardian's San Luis Obispo office. *See* Exhibit B at 3:14-19; 12:6-15.



4. On April 1, 1992, I sent a letter to Richard Isham, who at the time was counsel for Mr. Kokkonen. The April 1, 1992 letter is attached hereto as Exhibit C. The letter confirmed, among other things, the parties' understanding that Mr. Kokkonen would return all The Guardian's files in his possession on or before April 6, 1992.

5. Attached hereto as Exhibit D is a true and accurate copy of defendants' trial exhibit number 26, and attached hereto as Exhibit E is a true and accurate copy of defendants' trial exhibit number 28. Both these exhibits were submitted into evidence at the trial of this action. When Mr. Kokkonen was questioned at trial about these exhibits, he admitted that he authored both Exhibit 26 and Exhibit 28. He further admitted that he included the phrase "Your client files have not been reassigned to anyone. I have them." Mr. Kokkonen admitted that he sent hundreds of these letters to individual Guardian policyholders. He stated that he was unsure whether he actually had Mr. Cook's or Mr. Burns' file, but testified that in many cases he had the files of the individuals to whom he sent this form letter.

6. On April 7, 1992, I was informed by Carl Hagmaier of The Guardian's San Luis Obispo office that Mr. Kokkonen failed to return certain Guardian files that he agreed to return as part of the settlement agreement. Mr. Hagmaier described the files which Mr. Kokkonen did not return as individual life insurance files and individual disability files. Mr. Hagmaier also informed me that Mr. Kokkonen did return group insurance files to The Guardian, but that these files had terminated and were of no value. Subsequently on April 7, 1992, I sent a letter to Richard Isham, attorney for Mr. Kokkonen, stating,

among other things, that Mr. Kokkonen failed to return the individual life and disability insurance files to The Guardian. Attached hereto as Exhibit F is a true and accurate copy of that letter.

7. In response to my April 7, 1992 letter, Mr. Isham sent me a letter dated April 8, 1992, advising me that he no longer represented the interests of Mr. Kokkonen and that if it became necessary to contact Mr. Kokkonen, I could do so directly. Attached hereto as Exhibit G is a true and accurate copy of that letter.

8. Mr. Kokkonen never responded to my April 7, 1992 letter to Mr. Isham. Subsequently, I sent Mr. Kokkonen a letter dated April 16, 1992, and informed him that he had failed to comply with the parties settlement agreement because he did not return The Guardian's individual life insurance files and individual disability insurance files. I requested that Mr. Kokkonen return all the remaining Guardian files he possessed before the close of business on April 20, 1992. Attached hereto as Exhibit H is a true and accurate copy of that letter. Mr. Kokkonen never responded to the April 16, 1992 letter.

9. On or about April 25, 1992, I spoke with Dennis d'Autremont of The Guardian's San Luis Obispo office. Mr. d'Autremont informed me that he examined the files which Mr. Kokkonen returned on April 6, 1992 and that Mr. Kokkonen returned only terminated group files. He also stated Mr. Kokkonen had returned no individual life insurance policy files or individual disability insurance files.

10. In light of the fact Mr. Kokkonen remains unwilling to return the files to The Guardian, I filed the



accompanying Motion to Enforcement Settlement Agreement and Sanctions on behalf of The Guardian. My billable rate is $165.00 per hour. I have spent six hours on the Motion to Enforce Settlement Agreement, not including the Reply Brief (if any), or the court appearance (if any).

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California on May 20, 1992.

/s/ James A. Napoli
JAMES A. NAPOLI

---

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

| | | |
|---|---|---|
| MATT T. KOKKONEN AND JEAN KOKKONEN, PLAINTIFFS, VS. THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, GUARDIAN INSURANCE AND ANNUITY CORPORATION, GUARDIAN INVESTOR SERVICES CORPORATION, AND DOES 1 THROUGH 20, INCLUSIVE, DEFENDANTS. | ) | CVF90325 REC |

DEPOSITION OF MATT T. KOKKONEN

MARCH 7, 1991

Reported By: CRAIG E. BARNETT, CSR NO. 6720
Central Coast Court Reporters
106 East Boone Street
Santa Maria, CA 93454
(805) 928-2683

1103 Johnson Ave.
San Luis Obispo, CA 93401
(805) 544-6352

Registered Professional Reporters

VOLUME I, PAGES 2-87

* * *

[p.34] DENIED THAT.

ARE THERE ANY OTHER COMPANIES INVOLVED BESIDES THE GUARDIAN?

A. I BELIEVE I HAVE MISUNDERSTOOD SOME OF YOUR QUESTION. [sic]

Q. OKAY, LET ME PUT IT THIS WAY: WHAT YOU JUST TOLD ME IS THAT THE FILES THAT YOU BELIEVE THE GUARDIAN IS IMPROPERLY POSSESSING ARE GUARDIAN INSURANCE POLICY HOLDERS' FILES, AND I'M SAYING TO YOU NOW, THERE ARE NO OTHER COMPANIES INVOLVED, CORRECT?

A. THAT'S NOT AT ALL NECESSARILY TRUE.

Q. WHY DON'T YOU EXPLAIN YOURSELF, BECAUSE NOW YOU'RE – STRIKE THAT. WHY DO YOU SAY THAT?



A. THE AGENTS OF THE GUARDIAN WHO ARE THEIR EMPLOYEES DO HAVE INFORMATION IN THEIR POSSESSION ON CLIENTS OF MY AGENCY.

Q. ARE THOSE CLIENTS OF YOUR AGENCY GUARDIAN INSURANCE POLICYHOLDERS?

A. YES.

Q. AND THOSE ARE THE FILES WE'RE TALKING ABOUT?

A. AND IN THOSE FILES THEY HAVE INFORMATION ABOUT OTHER COMPANIES, PRODUCTS THAT ARE BEING RECOMMENDED AS REPLACEMENTS FOR THE GUARDIAN POLICYHOLDERS THROUGH THE AGENCY.

Q. BUT THE FACT IS THAT THEY'RE GUARDIAN [p. 35] INSURANCE POLICYHOLDERS, CORRECT?

A. YES.

Q. DO YOU HAVE ANY GUARDIAN AGENCY FILES IN YOUR POSSESSION?

A. WOULD YOU EXPLAIN YOUR QUESTION A LITTLE MORE, PLEASE.

Q. THE AGENCY FILES IN CONNECTION WITH GUARDIAN POLICYHOLDERS, DO YOU HAVE ANY OF THOSE FILES IN YOUR POSSESSION?

A. YES.

Q. WHICH ONES, IF YOU REMEMBER? WELL, LET ME PUT IT THIS WAY: MORE THAN ONE?

A. YES.

Q. APPROXIMATELY HOW MANY?

A. THAT'S VERY HARD FOR ME TO SAY, BUT PERHAPS I CAN SAY A COUPLE OF HUNDRED RIGHT OFF THE TOP OF MY HEAD.

Q. OKAY, THAT'S YOUR BEST ESTIMATE?

A. AT THIS TIME.

Q. OKAY, THAT'S FAIR ENOUGH. SUBSEQUENT TO YOUR TERMINATION AS A GENERAL AGENT OF THE GUARDIAN, DID YOU DENY GUARDIAN AGENTS ACCESS TO AGENCY FILES –

A. YES.

Q. – OF GUARDIAN POLICYHOLDERS?

A. I DENIED THEM AN UNLIMITED ACCESS TO CLIENT FILES IN MY AGENCY, TO MY AGENCY FILES.

[p. 36] Q. AND THOSE AGENCY FILES ARE REGARDING GUARDIAN POLICYHOLDERS?

A. YES.

MR. NAPOLI: DID YOU GET ALL THAT?

THE REPORTER: YES.

MR. ISHAM: WELL, I THINK HE GOT IT ALL BECAUSE HE'S GOTTEN EVERYTHING ELSE SO FAR, RIGHT?

THE REPORTER: YES.

MR. NAPOLI: CAN WE GO OFF THE RECORD? WELL, WE CAN STAY ON THE RECORD.



Q. I DIDN'T MENTION THIS AT FIRST, BY THE WAY, AND YOU'RE DOING AN EXCELLENT JOB, BUT ONE THING WE WANT TO TRY TO AVOID THAT WE JUST DID A LITTLE BIT THEN IS BOTH OF US SPEAKING AT ONE TIME, BECAUSE HE'S ONE MAN AND ONE MACHINE OVER THERE. SO WE'LL KIND OF TRY TO PAY MORE ATTENTION TO THAT. YOU'VE BEEN DOING AN EXCELLENT JOB AT THAT, BUT AS LONG AS IT JUST HAPPENED THAT ONE TIME, IT'S WORTH MENTIONING.

THE AGENCY FILES ARE FOR AGENCY BUSINESS, CORRECT?

A. YES, FOR MY AGENCY BUSINESS.

MR. NAPOLI: I'M GOING TO HAND YOU A DOCUMENT WHICH WILL BE MARKED AS PLAINTIFF'S DEPOSITION EXHIBIT 1, AND LET THE RECORD REFLECT I'VE HANDED PLAINTIFF AND HIS COUNSEL A COPY, AND HERE'S A COPY FOR OUR COURT REPORTER.

* * *

EXHIBIT B

[This Exhibit Reprinted In Full Above At 76-88.]

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EXHIBIT C

EPSTEIN BECKER & GREEN
Attorneys at Law
111 Pine Street, Suite 1200
San Francisco, California 94111-5614

(415) 398-3500
Fax: (415) 398-0955
Telex: 710-111-4540
Cable Address: EBSGLAW

[Letterhead Addresses Omitted In Printing]

April 1, 1992

Richard B. Isham, Esq.
2902 West Main Street, Suite A
Visalia, California 93291-5731

Re: Kokkonen v. The Guardian

Dear Mr. Isham:

This is to confirm our agreement that we will not draft a formal settlement document in connection with the above-referenced matter, but rather rely on the settlement agreement as stated in the court record. I further understand that in compliance with the parties' agreement, Mr. Kokkonen will provide the San Luis Obispo agency with all the Guardian files he possesses during



regular business hours, on or before April 6, 1992, and, that the settlement payment of the $10.00 Mr. Kokkonen owes to The Guardian will be sent to this office on or before April 6, 1992. If your understanding of our agreement does not comport with this confirmation, please contact me immediately.

Finally, pursuant to the Court's direction enclosed please find the original Stipulation and Order of Dismissal. Please sign the same and return it to me. I will file it and provide you with a court-endorsed copy.

Thank you for your courtesy and cooperation throughout the course of this matter.

Very truly yours,

/s/ James A. Napoli
James A. Napoli

---

EXHIBIT D

*Matt Kokkonen, CLU*
*Chartered Financial Consultant*

March 9, 1990

Gregory E. Cooke
811 Crenshaw Court
Paso Robles, CA 93446

Dear Greg,

August 1989 marked twenty years of service for me in the life insurance and financial planning fields. Many

changes have occurred in the industry since then. I'm very excited about the resiliency of our industry.

You may have just recently received a letter or a phone call from Guardian Life indicating that there have been changes in my association with them. The letter also states that someone else has been assigned to your files.

The fact is that my agency is still at 1103 Johnson Avenue, San Luis Obispo, Ca. 93401 and my phone remains 805-541-1880. I am still in the business. Your client files have not been reassigned to anyone. I have them. The Guardian may wish to have you do your business with their new office. I do not. I value you as a client and will continue to service your financial needs, assuming you want that, of course.

These events did make me reflect back on my career a bit. I have always attempted to be up-to-date on my profession. Therefore, right from the beginning, I made a commitment to be involved in the continuing education. Although not required to pursue any studies, I earned a Chartered Life Underwriter degree in 1973. I added a stock broker's license, a Master of Science degree in Financial Services, a Chartered Financial Consultant degree and, most recently a second Master of Science degree in management in 1986. Twenty years of insurance and tax planning experience together with demonstrated knowledge and superior products should have a direct impact on your financial portfolio. During this time my wife Jean has been most supportive and understanding and I wish to express my appreciation for that as well.

My agency represents approximately 40 insurance companies. The company affiliations do change from time to



time. I have just added a major carrier with the most competitive "Survivorship" or "Second-to-Die" policy on the market. This is used for estate tax planning purposes.

What does this most recent change mean to you? Not necessarily anything. As an independent contractor, agent and broker, I will continue to service you and your interests, even though I might not carry an agency appointment with a particular life insurance company. I will not be placing new insurance or investment products with The Guardian. I will continue to recommend that you keep your existing products with The Guardian and other companies as long as they are competitive, suitable for you, and as long as the company is credible and has enough integrity to be cooperative with your and my service needs.

Therefore, if you wish me to continue to work on your behalf directly without interference by other employees or agents from The Guardian Life Insurance Company, please sign the enclosed authorization and directive and return it in the envelope provided. I will appreciate an early response from you. Quite possibly other Guardian agents may be calling on you. The choice for an agent, of course, is yours and I fully respect that. I have your files and will keep them updated appropriately.

Again, it is with much personal satisfaction that I share this news with you as I look forward to many more years

of financial planning and insurance service. Thank you again for your past support.

Sincerely,

/s/ Matt Kokkonen
Matt Kokkonen, CLU
Chartered Financial Consultant

---

EXHIBIT E

*Matt Kokkonen, CLU*
*Chartered Financial Consultant*

March 9, 1990

David L. Burns
2289 Florence
San Luis Obispo, CA 93401

Dear David,

August 1989 marked twenty years of service for me in the life insurance and financial planning fields. Many changes have occurred in the industry since then. I'm very excited about the resiliency of our industry.

You may have just recently received a letter or a phone call from Guardian Life indicating that there have been changes in my association with them. The letter also states that someone else has been assigned to your files.

The fact is that my agency is still at 1103 Johnson Avenue, San Luis Obispo, Ca. 93401 and my phone remains



805-541-1880. I am still in the business. Your client files have not been reassigned to anyone. I have them. The Guardian may wish to have you do your business with their new office. I do not. I value you as a client and will continue to service your financial needs, assuming you want that, of course.

These events did make me reflect back on my career a bit. I have always attempted to be up-to-date on my profession. Therefore, right from the beginning, I made a commitment to be involved in continuing education. Although not required to pursue any studies, I earned a Chartered Life Underwriter degree in 1973. I added a stock broker's license, a Master of Science degree in Financial Services, a Chartered Financial Consultant degree and, most recently a second Master of Science degree in management in 1986. Twenty years of insurance and tax planning experience together with demonstrated knowledge and superior products should have a direct impact on your financial portfolio. During this time my wife Jean has been most supportive and understanding and I wish to express my appreciation for that as well.

My agency represents approximately 40 insurance companies. The company affiliations do change from time to time. I have just added a major carrier with the most competitive "Survivorship" or "Second-to-Die" policy on the market. This is used for estate tax planning purposes.

What does this most recent change mean to you? Not necessarily anything. As an independent contractor, agent and broker, I will continue to service you and your interests, even though I might not carry an agency appointment with a particular life insurance company. I

will not be placing new insurance or investment products with The Guardian. I will continue to recommend that you keep your existing products with The Guardian and other companies as long as they are competitive, suitable for you, and as long as the company is credible and has enough integrity to be cooperative with your and my service needs.

Therefore, if you wish me to continue to work on your behalf directly without interference by other employees or agents from The Guardian Life Insurance Company, please sign the enclosed authorization and directive and return it in the envelope provided. I will appreciate an early response from you. Quite possibly other Guardian agents may be calling on you. The choice for an agent, of course, is yours and I fully respect that. I have your files and will keep them updated appropriately.

Again, it is with much personal satisfaction that I share this news with you as I look forward to many more years of financial planning and insurance service. Thank you again for your past support.

Sincerely,

/s/ Matt
Matt Kokkonen, CLU
Chartered Financial Consultant

Matt Kokkonen, CLU
Chartered Financial Consultant

I hereby authorize and direct you to send all service data, records and computer ledgers on my policies directly to my agent, Matt Kokkonen, CLU as he may request at the



following address: 1103 Johnson Avenue, San Luis Obispo, California 93401.

_____

Policyholder

_____

EXHIBIT F

EPSTEIN BECKER & GREEN

Attorneys at Law

111 Pine Street, Suite 1200

San Francisco, California 94111-5614

_____

(415) 398-3500

Fax: (415) 398-0955

Telex: 710-111-4540

Cable Address: EBSGLAW

[Letterhead Addresses Omitted In Printing]

April 7, 1992

VIA FACSIMILE: (209) 733-4243

Richard B. Isham, Esq.
2902 West Main Street, Suite A
Visalia, California 93291-5731

Re: Kokkonen v. The Guardian

Dear Mr. Isham:

This letter is to inform you that Matt Kokkonen has failed to comply with the parties' settlement agreement in connection with the above-referenced matter. Yesterday, Mr. Kokkonen was to return all The Guardian files in his possession, including: life insurance files; disability insurance files; and group insurance files. Unfortunately, Mr. Kokkonen only returned certain group insurance files and has failed to return the life insurance files and the disability insurance files. If the life insurance files and disability insurance files are not returned before the close of business on April 8, 1992, we will file a motion before Judge Coyle to enforce the settlement agreement.

Mr. Kokkonen also has violated the settlement agreement by sending correspondence on his own letterhead signed by himself directly to the San Luis Obispo office directing them to engage in activity on behalf of a Guardian policyholder. The Guardian will not tolerate any further correspondence of this nature from Mr. Kokkonen on his letterhead. Upon the receipt of another letter from Mr. Kokkonen, we will immediately bring this matter to the attention of Judge Coyle.

I would appreciate your contacting me as soon as possible regarding this matter.

Very truly yours,

/s/ James A. Napoli
James A. Napoli

---



EXHIBIT G

Law Offices of
RICHARD B. ISHAM
A Professional Corporation
2902 West Main Street
Visalia, California 93291-5731
Telephone (209) 733-2257
Fax (209) 732-9959

April 8, 1992

Mr. James A. Napoli
Epstein, Becker & Green
Attorneys at Law
111 Pine Street, Suite 1200
San Francisco, CA 94111-5614

Re: Kokkonen vs. The Guardian

Dear Mr. Napoli:

Please be advised that this office no longer represents the interests of Mr. Kokkonen. If it becomes necessary to contact him, you may do so directly until he advises you to the contrary.

Thank you for the many personal courtesies extended to me during the time that we worked on this case. I look forward to visiting with you in San Francisco if the

opportunity presents itself, and likewise, should you be in my part of the world, please stop in.

Yours truly,

LAW OFFICES OF
RICHARD B. ISHAM

/s/ Richard B. Isham
Richard B. Isham

RBI:djh
3695

cc: Mr. Matt T. Kokkonen

---

EXHIBIT H

EPSTEIN BECKER & GREEN
Attorneys at Law
111 Pine Street, Suite 1200
San Francisco, California 94111-5614

(415) 398-3500
Fax: (415) 398-0955
Telex: 710-111-4540
Cable Address: EBSGLAW
[Letterhead Addresses Omitted In Printing]



April 16, 1992

VIA FACSIMILE (805) 541-2853 AND REGULAR MAIL

Mr. Matt T. Kokkonen, CLU
1103 Johnson Avenue
San Luis Obispo, CA 93401

Re: Kokkonen v. The Guardian

Dear Mr. Kokkonen:

Pursuant to a letter I received from Richard Isham on April 8, I understand that he no longer represents you in connection with the above-referenced matter, and he has authorized me to contact you directly.

This letter is to inform you that you have failed to comply with the parties' settlement agreement in connection with the above-referenced matter. On April 6, you were to return *all* The Guardian files in your possession, including: life insurance files; disability insurance files; and group insurance files. Unfortunately, you only returned certain group insurance files and have failed to return the life insurance files and the disability insurance files. If the life insurance files and disability insurance files are not returned before the close of business on April 20, 1992, we will file a motion before Judge Coyle to enforce the settlement agreement.

I am informed that when you returned the group files you directed your secretary Lisa Hyland to carry the files from your car to The Guardian's office even though she is in the late stages of a pregnancy. Accordingly, when you comply with the settlement agreement and provide The Guardian's San Luis Obispo office with all The Guardian files in your possession, representatives in that office

would be happy to carry the files from your car into their office.

Finally, you have also violated the settlement agreement by sending correspondence on your own letterhead signed by yourself directly to the San Luis Obispo office directing them to engage in activity on behalf of a Guardian policyholder. The Guardian will not tolerate any further correspondence of this nature from you. Upon the receipt of another letter, we will immediately bring this matter to the attention of Judge Coyle.

Very truly yours,

/s/ James A. Napoli
James A. Napoli

---



JENCKS & HUNT
Michael R. Jencks SBN 053822
555 Chorro Street, Suite B
San Luis Obispo, CA 93405
(805) 544-1890
Telephone (805) 544-1890
Facismile (805) 544-1894

Attorneys for Plaintiff and Counter-Defendant
MATT T. KOKKONEN

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| MATT T. KOKKONEN; and JEAN KOKKONEN,<br><br>Plaintiffs,<br><br>vs.<br><br>THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, THE GUARDIAN INSURANCE AND ANNUITY CORPORATION; THE GUARDIAN INVESTOR SERVICES CORPORATION; and DOES 1 through 20 inclusive,<br><br>Defendants, | No. CVF 90 0325 REC<br><br>PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT GUARDIAN'S MOTION TO ENFORCE SETTLEMENT AGREEMENT<br><br>Date: June 29, 1992<br>Time: 1:30 p.m.<br>Dept: 1 |

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,

Counter-Claimant,

vs.

MATT T. KOKKONEN,

Counter-Defendant.

## INTRODUCTION

Defendant, The Guardian Life Insurance Company of America (hereinafter "GUARDIAN") has moved "to enforce the settlement agreement in the above referenced action and for sanctions" upon the ground that plaintiff has failed to fully comply with "the spirit of the settlement agreement . . . to return these individual files." (see defendant's Memorandum of Points and Authorities Support of Motion to Enforce Settlement Agreement and Sanctions, hereafter "DEFENDANT'S MEMORANDUM", page 4 lines 26 - 28).

At the plaintiff's deposition in this action, plaintiff admitted that he still had "*Agency* files in connection with Guardian policyholders in your possession" and he estimated they numbered "a couple of hundred". [Emphasis supplied]. In the trial subpoena served on plaintiff in this matter, plaintiff was ordered to produce "any and all *Agency* files in connection with The Guardian's policyholders, including but not limited to, the 200 Agency files which Kokkonen testified under oath at deposition that he possessed." [Emphasis supplied]. As part of the



settlement reached in this matter on March 6, 1992, plaintiff agreed "to the extent he has any Guardian files . . . [to] turn over those files, but he will be allowed to copy them and retain those copies for his own records, whatever he has now." The parties subsequently agreed to effect the transfer of those approximately 200 files on or before April 6, 1992. In fact, on April 6, 1992, defendants concede plaintiff delivered approximately 275 files as requested. But defendants now protest that although these files were indeed *Agency* files belonging to The Guardian, they were lapsed or otherwise no longer active policies and now apply to this court to enforce not the literal words of the order but the "spirit of the agreement" to try to reach personal Agent files that may still be in Mr. Kokkonen's possession.

Plaintiff submits defendants' motion is poorly founded for the following reasons:

## I

## DEFENDANT'S RELIANCE ON SPRINGPARK TO SUSTAIN THE JURISDICTION OF THIS COURT IS MISPLACED AND WITHOUT A GOOD FAITH BASIS IN EXISTING LAW

The only legal authority cited by defendant Guardian for its motion – and for the authority of this court to decide its motion – are two Ninth Circuit decisions: In the matter of *Springpark Associates, Crown Life Insurance Co. v. Springpark Associates,* 623 F.2d 1377 (1980) (hereafter "SPRINGPARK"), and *Decanay v. Mendoza,* 573 F.2d 1075 (1978) (hereafter "DECANAY"). Defendant's reliance on these cases is misplaced.

In *Springpark*, the parties before the Court reached a stipulation which was incorporate in and made an order of the Court and the action was dismissed. Subsequently, one of the parties filed a second Chapter XII proceeding; the question was what "effect [is] to be accorded the August stipulation agreement" in the matter then properly before it, not as defendant would have us believe whether the court with no proceeding before it and the settlement not having been incorporate nor made an order of the Court, can assert jurisdiction to police a settlement agreement. Indeed, this is the reason for the caveat in the Court's opinion, quoted by defendant:

> " . . . it is equally well settled in the usual litigation context that courts have inherent power summarily to enforce a settlement agreement *with respect to an action pending before it.*" [Emphasis supplied] *Springpark*, supra, at 1380.

Here, the underlying action has been dismissed and there is no action now pending before the Court. Indeed, any other reading would convert our District courts, already overburdened by diversity cases, into the policemen of all settlements with disastrous practical and policy consequences.

Defendant's cavalier and mistaken reading of *Springpark* and argument based thereon, is further exposed by a reading of the opinion in *Decanay*, the only other authority offered by defendant. In *Decanay*, a pending matter was still before the court, in fact, a motion to approve the settlement of a personal injury suit to which a minor was a party. In fact, it is that decision's language, "that courts have inherent power summarily to enforce a settlement agreement with *respect to an action pending before it*"



(emphasis supplied), that was quoted and adopted by the *Springpark* court.

Neither the *Springpark* or *Decanay* decisions do what defendant says they do: justify jurisdiction to enforce a settlement agreement in the absence of any pending matter before the Court. And here, the settlement was not even made a part of the court order as it was in both *Springpark* and *Decanay*, giving those courts substantially greater vested interest in the enforcement of its orders than is the case here where the settlement does not bear the Court's approval or imprimatur.

Plaintiff contends that this court is without authority or jurisdiction to act or decide defendant's motion and that the motion is without good faith legal basis in existing law, warranting imposition of an appropriate sanction under F.R. Civ.P. 11.

## II

## THE SETTLEMENT AGREEMENT HAS BEEN COMPLIED WITH IN RESPECT TO THE RETURN OF GUARDIAN AGENCY FILES

On April 6, 1992, plaintiff testified as outlined in his Declaration, that he returned all remaining Guardian agency files in his possession to defendants. Some 2,000 Guardian agency files have previously been returned to The Guardian prior to the trial and settlement of this action. The issue of the files arose only because of Mr. Kokkonen's candid admission in his deposition that he still possessed some 200 Agency files. In fact, these were files that Mr. Gorman, defendant's Territorial Manager,

had declined to take when he inspected the Agency's files and made arrangements for them to be moved some two years ago. Based on plaintiff's deposition testimony, defendants caused a subpoena to issue for the plaintiff to produce at trial those 200 files which plaintiff had canceded [sic] still having in his possession. It is clear from this history and etiology that the file issue concerning the 200 files which Mr. Kokkonen testified having in his possession and the 200 files which were subpoenaed at trial and the 200 files (actually 275), that were finally delivered to the defendants on April 6, 1992 pursuant to the settlement, are the same files. Those files have been returned pursuant to the settlement aagreement [sic].

III

**DEFENDANTS REQUEST THAT THIS COURT ENFORCE THE SPIRIT OF THE SETTLEMENT AGREEMENT BELIES THE FATAL UNCERTAINTY OF THE AGREEMENT**

Defendants as a practical matter, concede that the agreement as they themselves and their counsel recited for the record on March 6, 1992, does not by its words require the return of other than The Guardian files in plaintiff's possession. Therefore, defendants instead argue that "the spirit of the settlement agreement [was] for Mr. Kokkonen . . . to return these individual files." (Defendants Memorandum page 4, lines 26 - 28). This appeal to the court to enforce not the actual words or terms, but the spirit of the contract is a tacit acknowledgement that the summary of the settlement agreement, recited for the record by Robert Dolinko, defendants



Senior Trial counsel, is to [sic] vague and imprecise to even identify much less compel the production of any other files in this matter. The record is clear that defendants have already recovered or had returned to them all original Guardian files and all Agency copies of Guardian Agency files. The Guardian's instant motion in effort to use the offices of this court in pursuit of additional records is disingenuous.

IV

**DEFENDANT'S REFUSAL TO ENGAGE IN INFORMAL DISCUSSIONS TO RESOLVE THIS ISSUE BELIE THEIR MOTIVES AND BAD FAITH**

As discussed in the declaration of Michael R. Jencks in support of the accompanying application to continue hearing and for an extension of time to file opposition, plaintiff by and through the offices of his new counsel attempted to resolve this dispute, including offering to set up a mechanism for a third party inventory of files to better identify what files exist and what each parties' interest in them might be. These efforts were refused.

V

**HEARSAY STATEMENTS BY THE COURT WOULD LEAD A REASONABLE PERSON TO QUESTION THE COURT'S IMPARTIALITY**

As discussed in greater detail in plaintiff's application for a continuance of the hearing on defendants' motion, on June 25, 1992, plaintiff became aware of statements allegedly made by the Court in this matter which

might reasonably place the court's impartiality in question. Specifically, James A. Napoli, one of the attorneys for Epstein, Becker & Green, counsel for the defendants in this matter, informed Mr. Jencks, plaintiff's new counsel, that after the settlement had been reached and the jury dismissed, Mr. Napoli has met privately with the court, out of the presence of plaintiff or plaintiff's counsel, and in the course of the discussion, according to Napoli, the Court stated that the plaintiff, Mr. Kokkonen, had "lied through his teeth" at trial. If this statement was in fact made, it would call into question the Court's impartiality in continuing to hear and decide further issues in this matter. See 28 USC §§ 455(A); also *Rice v. McKenzie*, 581 F.2d 1114, 1118 (4th Cir 1978).

Accordingly, plaintiff requests that the Court postpone deciding on this motion until he can investigate Mr. Napoli's allegations and decide whether to make a motion is warranted and should be brought under 28 USCA section 455a.

## CONCLUSION

Plaintiff believes that in light of the disqualification issue raised by defense counsel, the Court should continue or otherwise abstain from deciding this matter until plaintiff investigate and/or make appropriate motion under 28 USCA section 455a. If the court is disposed to rule on the motion, notwithstanding plaintiff's objection to his doing so at this time, Plaintiff requests that the



Court deny the motion in its entirety.

Dated: June 29, 1992.

JENKS & HUNT

By _____
Michael R. Jencks,
Attorney for Plaintiff
Matt Kokkonen

JENCKS & HUNT
Michael R. Jencks SBN 053822
555 Chorro Street, Suite B
San Luis Obispo, CA 93405
Telephone (805) 544-1890
Facismile (805) 544-1894

Attorneys for Plaintiff and Counter-Defendant
MATT T. KOKKONEN

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| MATT T. KOKKONEN; and JEAN KOKKONEN,<br><br>Plaintiffs,<br><br>vs.<br><br>THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, THE GUARDIAN INSURANCE AND ANNUITY CORPORATION; THE GUARDIAN INVESTOR SERVICES CORPORATION; and DOES 1 through 20 inclusive,<br><br>Defendants, | No. CVF 90 0325 REC<br><br>DECLARATION OF LISA HYLAND IN OPPOSITION TO MOTION TO ENFORCE SETTLEMENT AND FOR SANCTIONS<br><br>Date:<br>June 29, 1992<br>Time: 1:30 p.m.<br>Dept: I |



THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,

Counter-Claimant,

vs.

MATT T. KOKKONEN,

Counter-Defendant.

I, Lisa Hyland, declare as follows:

1. My name is Lisa Hyland and my business address is 1103 Johnson Avenue, San Luis Obispo, California 93401. I am submitting this Declaration in Opposition to the Motion to Enforce the Settlement Agreement and for Sanctions filed by The Guardian defendants in the above entitled matter.

2. I am, and have since October 31, 1988, been employed by Matt Kokkonen as his agency's new business clerk and as his personal secretary. As such, I am familiar with the agency's filing system and have had full access to his agency and personal client files.

3. The following procedures were established for files and constituted that agency's custom and practice during the period of my employment.

a) Original applications and forms were sent to The Guardian's home office for their files. ("Original file")

b) Each agent was to keep a personal copy of the application in a file. ("Agent's file")

c) Kokkonen Agency made a file, with copies of the application and forms. ("Agency file")

d) When a policy terminated, the files were marked, removed and periodically thrown away.

Agents had access to the Kokkonen Agency files and would often remove files. Some of the files were not returned by the agents.

4. After Kokkonen Agency files were removed by The Guardian in November, 1989, I have not been aware of nor have I had any knowledge of any General Agency files in the custody of the Kokkonen Agency except for old terminated cases.

5. On April 6, 1992, I accompanied Mr. Kokkonen and the two boxes of approximately 275 files to The Guardian San Luis Obispo office located at 414 Higuera Street, Suite A, San Luis Obispo, California 93401.

6. When we arrived at The Guardian offices, Mr. Kokkonen personally carried the two boxes of files from his car and deposited them outside the front door at The Guardian; Mr. Carl Hagmaier, whom I know personally, signed for the files at that time and I witnessed him moving the two boxes into the lobby of The Guardian offices.

7. I did not personally carry any of the files or boxes due to the fact that I was pregnant.



I declare that the foregoing is true and correct under penalty of perjury and that this instrument was executed this 26 day of June, 1992 at San Luis Obispo, California.

/s/ Lisa Hyland
Lisa Hyland, Declarant

[Proof Of Service Omitted In Printing]

JENCKS & HUNT
Michael R. Jencks SBN 053822
555 Chorro Street, Suite B
San Luis Obispo, CA 93405
Telephone (805) 544-1890
Facismile (805) 544-1894

Attorneys for Plaintiff and Counter-Defendant MATT T. KOKKONEN

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| MATT T. KOKKONEN; and JEAN KOKKONEN,<br><br>Plaintiffs,<br><br>vs.<br><br>THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, THE GUARDIAN INSURANCE AND ANNUITY CORPORATION; THE GUARDIAN INVESTOR SERVICES CORPORATION; and DOES 1 through 20 inclusive,<br><br>Defendants, | No. CVF 90 0325 REC<br><br>DECLARATION OF MATT KOKKONEN IN OPPOSITION TO MOTION TO ENFORCE SETTLEMENT AND FOR SANCTIONS<br><br>Date:<br>June 29, 1992<br>Time:<br>1:30 p.m.<br>Dept: I |



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| THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,<br><br>Counter-Claimant,<br><br>vs.<br><br>MATT T. KOKKONEN,<br><br>Counter-Defendant. | |

I, Matt Kokkonen declare as follows:

1. I am one of the plaintiffs in this action and submit this declaration in opposition to the Motion by The Guardian Defendants to Enforce the Settlement Agreement and For Sanctions.

2. The settlement reached by the parties to the litigation, and as recited in the official reporter's transcript (a true and correct copy of which is attached hereto as Exhibit "A"), on the subject of Guardian files states that:

> "to the extent he [Kokkonen] has any Guardian files or files containing information regarding Guardian policy holders, will turn over those files, but he will be allowed to copy them and retain those copies for his own records, whatever he has now."

3. During the period of time in which I was a principal pursuant to a General Agency contract with The Guardian, it was my agency's practice to maintain a three tier file system. First, Original insurance applications and forms, including all those signed by a policyholder, part of the original file which was forwarded directly to The Guardian's home office. Second, each agent was to keep a

personal copy of the application in his or her own file for each policy he or she obtained. We refer to this file as the "Agent's or Client's file". Third, the Kokkonen Agency made a file with copies of the application and all forms for each policy as sold and administered. This file was referred to as the "Agency file". It is this file which was kept by me as the principal under the General Agency Agreement and maintained in connection with and pertaining to the business of The Guardian, that under the settlement agreement, was to be returned to the defendants.

4. In or about November, 1989, Mr. John Gorman, Territorial Director for The Guardian, personally visited and reviewed my General Agency's files in my presence. He identified the files he wanted to retain for The Guardian. Gorman did not want and expressly declined to take terminated and lapsed case files. All files designated by Mr. Gorman, numbering approximately 2,000 files, were picked up by The Guardian's moving company a few days later.

5. I have now provided The Guardian with two complete sets of files, the originals of all papers and the Agency files from my agency. In addition, The Guardian has reconstructed all missing Agency files at a claimed cost of $10,000., as testified to by Carl Hagmaier at trial.

6. The settlement agreement expressly permitted my retention of the copies of files, a position consistent not only with my agent's contract, but with discussion in or about November, 1989 with John Peluso, Guardian's counsel at its home office in New York, and John Gorman, Guardian's Territorial Director for The Guardian, both of



whom confirmed my right to maintain and possess such personal client files.

7. In my deposition noticed and taken in this action, I testified that I possessed approximately 200 General Agency files that pertained to The Guardian's business. These were the terminated and lapsed case files, which Mr. Gorman had previously reviewed but elected not to take.

8. In accordance with a subpena [sic] served on me, I brought these files, numbering approximately 275, with me to the trial of this action in March of 1992. The Guardian's counsel declined to take custody of the files during or after the trial so in light of the settlement understanding, I personally delivered them to The Guardian's San Luis Obispo office on or about April 6, 1992 in the company of my secretary, Lisa Hyland. I personally carried the files and deposited them at the front door at The Guardian's office.

9. There are no other General Agency files pertaining to The Guardian's business in my custody, control or possession.

I declare that the foregoing is true and correct under penalty of perjury and that this instrument was executed this 29 day of June, 1992 at San Luis Obispo, California.

/s/ Matt Kokkonen
Matt Kokkonen, Declarant

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EXHIBIT "A"

[This Exhibit Reprinted In Full Above At 76-88.]



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Attorneys for Defendants
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THE GUARDIAN LIFE
INSURANCE COMPANY OF AMERICA

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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| MATT T. KOKKONEN and JEAN KOKKONEN,<br><br>Plaintiffs,<br><br>v.<br><br>THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, THE GUARDIAN INSURANCE AND ANNUITY CORPORATION, THE GUARDIAN INVESTOR SERVICES CORPORATION, and DOES 1 through 20, inclusive,<br><br>Defendants. | No. CVF 90 325 REC<br><br>DEFENDANT'S REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO ENFORCE SETTLEMENT AGREEMENT AND SANCTIONS<br><br>Date: June 29, 1992<br>Time: 1:30 p.m.<br>Place: Dept. 1 |

THE GUARDIAN LIFE INSURANCE COMPANY, OF AMERICA,

Counter-Claimant,

vs.

MATT T. KOKKONEN,

Counter-Defendant.

## I. INTRODUCTION

Defendant and Counter-claimant, The Guardian Life Insurance Company of America ("The Guardian"), submits this brief in support of its Motion to Enforce Settlement and for Sanctions, and in reply to plaintiff's Memorandum in Opposition to Motion to Enforce Settlement Agreement ("Opposition"). The Guardian's moving papers were served on May 20 and filed on May 21, 1992. The hearing on this matter was held pursuant to notice on June 29, 1992. During the hearing, the Court accepted plaintiff's Opposition to the Motion and granted The Guardian ten days to file any reply. The Court also ruled that it had jurisdiction over this matter and took the matter under submission.

Plaintiff's Opposition seeks to resurrect a dispute which was settled after three days of litigation, *i.e.*, The Guardian's right to files containing information in connection with The Guardian policyholders. Plaintiff now seeks to avoid the express terms of the settlement agreed upon on the record by both parties before Judge Coyle. In pertinent part, the settlement provides:



> Mr. Kokkonen, to the extent he has any Guardian files or files containing information regarding Guardian policyholders, will turn over those files . . . (Napoli Decl., Exh. B, 3:14-17)

Unbelievable as it may seem to anyone familiar with this case, Mr. Kokkonen still refuses to turn over the files. Instead, his new counsel submits an Opposition that engages in semantics and simply seeks to relitigate the matter in an effort to avoid an express and essential term of the settlement. As demonstrated below, there is not a shred of merit to plaintiff's position, and the Court should grant The Guardian's Motion to Enforce by requiring Mr. Kokkonen to return all the files immediately and by sanctioning Mr. Kokkonen for his bad faith conduct.

## II. ARGUMENT

### A. The Court Has Ruled That It Has Jurisdiction over This Matter.

Plaintiff initially argues that the Court is without jurisdiction to enforce the settlement agreement the parties reached immediately after trial. However, at the June 29, 1992 hearing, the Court expressly ruled that it indeed had jurisdiction and took the matter under submission. In light of the Court's ruling, and the authority previously submitted, The Guardian will not address plaintiff's meritless argument.

### B. Plaintiff Has Failed to Return the Files and Seeks to Relitigate the Matter.

Plaintiff next argues that he returned all the remaining Guardian agency files in his possession, prior to the

trial and settlement of this action. Plaintiff further argues that he returned an additional 275 files to The Guardian on April 6, 1992. Plaintiff's arguments fail dismally for several reasons.

First, whatever files plaintiff may have returned prior to trial is irrelevant. The parties after trial expressly agreed that "Mr. Kokkonen, to the extent he has any Guardian files or *files containing information regarding Guardian policyholders,* will turn over those files, but he will be allowed to copy them and retain those copies for his own records, whatever he has now." (Tr. 3:14-18) Accordingly, under the express terms of the agreement, Mr. Kokkonen is to return all files in his possession containing information regarding Guardian policyholders.

Second, plaintiff attempts to make a distinction that he returned "agency files," on April 6, 1992. As explained in the Declarations of Carl Hagmaier and Dennis d'Autremont, submitted with The Guardian's opening papers, plaintiff calculatedly returned only files of no value whatsoever – lapsed group files. He returned no individual files in connection with Guardian policyholders. This was the central issue at trial, and this was a key component of the settlement. Mr. Kokkonen does not deny having these files; he simply refuses to turn them over.

This settlement is plain, simple and unambiguous. Mr. Kokkonen is required to turn over to The Guardian all files in his possession containing information regarding Guardian policyholders. He has failed to do so although he plainly possesses such files. Accordingly, the Court should order him to turn those files over to The



Guardian forthwith, and it should sanction him for his patent misconduct.

C. The Terms of the Settlement Agreement Are Certain and Unambiguous.

Plaintiff next argues that the terms of the settlement agreement are too vague to enforce. He states that The Guardian tacitly acknowledges that, asking this Court to enforce the "spirit of the settlement agreement." This argument is absolutely without merit.

Plaintiff's present counsel, Michael Jencks, did not participate in the litigation of this matter, the trial of this matter, or the settlement of this matter. He purports not to clearly understand the terms of the settlement agreement. However, the parties to the agreement, including Judge Coyle, who was present when the agreement was stated on record, have a clear understanding of the agreement. Indeed, the Court's view of the settlement's clear terms is set forth on the record, as the following excerpt demonstrates:

> MR. NAPOLI: Judge, do you understand the agreement? I just wanted to have one party not involved in this making sure that the judge understood the agreement.
>
> THE COURT: Oh, I understand.

(Tr. 12:25-13:4)

Indeed, with respect to Mr. Kokkonen returning to The Guardian its files or "files containing information regarding Guardian policyholders," there was no protracted discussion or need for clarification. The transcript

clearly and crisply recites what is to be done. It is now incumbent upon Mr. Kokkonen finally to perform as he agreed to perform.

D. The Guardian Has not Engaged in Bad Faith, and to the Contrary, Plaintiff Has Engaged in Bad Faith.

Plaintiff's counsel makes a final argument that he attempted to resolve this dispute if The Guardian would continue the hearing. However, during discussions with The Guardian's counsel, plaintiff's counsel essentially sought to relitigate the matter, redefine the terms of the settlement, and rehash the same arguments that were litigated at trial. Counsel also flatly refused to have Mr. Kokkonen return any files, and provided no adequate reason to continue the motion.

It is not bad faith for The Guardian to enforce a settlement agreement and thereby conclude litigation which should have been concluded months ago. Indeed, the bad faith here is clearly Mr. Kokkonen's refusal to honor the settlement and return the files.

As described in the declarations of James A. Napoli filed in connection with this motion, counsel for The Guardian has spent a total of 18 hours on this matter at a rate of $165 per hour. Accordingly, it is submitted that Mr. Kokkonen should be sanctioned in the amount of $2,970 payable to The Guardian by certified check within 10 calendar days of the Court's ruling.



III. CONCLUSION

For the foregoing reasons and those set forth in its opening papers, defendant and cross-complainant The Guardian Life Insurance Company of America respectfully requests that the Court grant its Motion to Enforce Settlement Agreement and Sanctions.

Dated: July 1, 1992

Respectfully submitted,

EPSTEIN BECKER & GREEN

By: /s/ James A. Napoli
James A. Napoli
Attorneys for Defendant and Counter-claimant THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA

[Proof of Service Omitted in Printing]

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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| MATT T. KOKKONEN and JEAN KOKKONEN,<br><br>Plaintiffs,<br><br>v.<br><br>THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA, THE GUARDIAN INSURANCE AND ANNUITY CORPORATION, THE GUARDIAN INVESTOR SERVICES CORPORATION, and DOES 1 through 20, inclusive,<br><br>Defendants. | ) No. CVF 90 325 REC<br>) SUPPLEMENTAL DECLARATION OF JAMES A. NAPOLI IN SUPPORT OF MOTION TO ENFORCE SETTLEMENT AGREEMENT AND SANCTIONS<br>) Date: June 29, 1992<br>) Time: 1:30 p.m.<br>) Place: Dept. 1 |



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| THE GUARDIAN LIFE INSURANCE COMPANY, OF AMERICA,<br><br>Counter-Claimant,<br><br>vs.<br><br>MATT T. KOKKONEN,<br><br>Counter-Defendant. | ) |

I, James A. Napoli, hereby declare and state as follows:

1. I am an attorney at law licensed to practice before all the courts of the State of California and before the United States District Court for the Eastern District of California. I am an attorney with Epstein Becker & Green, counsel of record for The Guardian Life Insurance Company of America ("The Guardian") in the above-captioned action. If called upon to testify as to the facts in this declaration, I could and would competently testify to them.

2. I submit this declaration in response to the papers filed on June 29, 1992 in opposition to The Guardian's Motion to Enforce Settlement Agreement and Sanctions which was heard on that same date.

3. In paragraph 4 of the Declaration of Michael R. Jencks, he states that on June 25, 1992, he had not heard whether The Guardian would remove the motion to enforce from the calendar as Mr. Jencks requested. What Mr. Jencks fails to include in his declaration is that during our June 25, 1992 conversation, I informed him that it

would be extremely unlikely that The Guardian would remove the motion from the Court's calendar, and that he should expect that we would go ahead with the hearing duly noticed for June 29, 1992. I also informed Mr. Jencks that the positions he was taking with respect to the files in Matt Kokkonen's possession were the same meritless arguments that had been raised by Mr. Kokkonen throughout the course of the litigation and that the parties had a trial involving those very same issues. I informed Mr. Jencks that the litigation had been settled with Mr. Kokkonen's express agreement that The Guardian was entitled to the files. Mr. Jencks stated that Mr. Kokkonen would not return the files.

4. In paragraph 6 of Mr. Jencks' Declaration, he states that I told him I had met with Judge Coyle out of the presence of the plaintiff and plaintiff's counsel, and that Judge Coyle had told me that "Matt Kokkonen had lied through his teeth at trial." Mr. Jencks' recitation of that aspect of my telephone conversation with him is in error. I informed Mr. Jencks that at the end of trial, Judge Coyle (in response to a question from defense counsel) invited all counsel, both plaintiff and defense counsel, into chambers to answer questions they might have in connection with the trial. I further informed Mr. Jencks that it was my impression that Judge Coyle recognized that Matt Kokkonen's testimony lacked credibility. I in no way quoted or ascribed any language to Judge Coyle.

5. In response to paragraph five of the Declaration of Matt Kokkonen, The Guardian has not reconstructed all the missing files pertaining to Guardian policyholders that Mr. Kokkonen refuses to return to The Guardian.



Furthermore, in response to paragraph eight of the Kokkonen Declaration, Mr. Kokkonen never offered custody of any files to me at the time of the trial of this matter.

6. In my initial Declaration, I informed the Court that my billable rate is $165.00 per hour, and that up to that time I had spent six hours on the motion to enforce settlement agreement and sanctions. To update the time I have spent in connection with this motion, I spent an additional eight hours preparing for the hearing, traveling to Fresno to take part in the hearing, and returning to the Bay Area. Furthermore, I spent an additional four hours in connection with the preparation of The Guardian's reply papers. The total amount of time I have spent in connection with this motion is 18 hours.

I certify under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed at San Francisco, California on July 1, 1992.

/s/ James A. Napoli
JAMES A. NAPOLI

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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| MATT KOKKONEN,<br>Plaintiff,<br>vs.<br>GUARDIAN LIFE INSURANCE,<br>Defendant. | ) | CASE NO.<br>CV-F-90-325-REC |

DEFENDANT'S MOTION TO ENFORCE SETTLEMENT AND FOR SANCTIONS

JUNE 29, 1992

APPEARANCES:

FOR THE PLAINTFF [sic]: JENCKS & HUNT
BY: MICHAEL R. JENCKS
555 Chorro Street
San Luis Obispo, CA 93405

FOR THE DEFENDANT: EPSTEIN, BECKER & GREEN
BY: JAMES A. NAPOLI
111 Pine Street
Suite 1200
San Francisco, CA
94111-5614

COURT REPORTER: GABRIELLE BROOKS TOMLINSON
C.S.R. NO. 7867

[p. 2] Fresno, CA June 29, 1992



PROCEEDINGS

THE COURT: May I have appearances for the record?

MR. JENCKS: Good morning, Your Honor. Michael Jencks of Jencks & Hunt. Substitution of Attorneys subject to Local 182, with the Court's approval.

MR. NAPOLI: Good afternoon, Your Honor. James Napoli on behalf of the Defendant, Guardian Life Insurance and moving party.

THE COURT: The Court was handed this about ten minutes ago approximately – I have not seen the Substitution of Attorneys. I've previously seen the application for the ordinance of settlement agreement. I see no basis for not signing the Substitution of Attorneys. The Court will so sign it.

I do have a concern on being served an application order for extending time and continuance in this matter, and I confess, Mr. Hunt –

MR. JENCKS: Mr. Jencks.

THE COURT: Excuse me, Mr. Jencks.

MR. JENCKS: I wish it could have been sooner, Your Honor.

MR. NAPOLI: Well, Your Honor. I would first like to address the merits of the motion that relate to the filing of the application.

THE COURT: There is no sense in addressing [p. 3] the merits of the motion. Let's address the motion.

MR. NAPOLI: First of all, this whole application is here, Your Honor. This case is carried on way too far. We settled it in your presence and in your chambers, and the time has come to enforce the agreement. This motion was filed May 21st. This is well over a month later and we finally get a response from the plaintiff.

I would ask the Court being that I was served the response moments ago, and was unable to read through the whole thing, that rather – and there is an opposition brief, and opposition declaration and rather than continuing the motion, having me come down from San Francisco, I would argue with you yet another time.

If the Court takes a short recess and reviews the papers and continues this, and if I continue this, it will be for sanctions only. That will be the only basis in which I would continue it, and I still don't know what it is that caused it, not having had a chance to review the whole document. Why is it, Mr. Jencks, we are here on this late date asking for continuance and -

MR. JENCKS: Your Honor, I was not able to get available to me a declaration of Mr. Isham who I recall is a plaintiff in this matter with commencement of this action of the settlement. I don't want to second guess the confusion. He apparently wrote a letter saying he was withdrawing the application over. There was some [p. 4] correspondence still going through, and he thought he was out. There was some confusion whether the plaintiff was still misrepresented by Mr. Isham.

I received the Substitution of Attorney back this Tuesday, and I immediately contacted Mr. Napoli. He thought there was some hope for resolution, which I



apologize, I have to say in having read the motion, I don't understand why there is any dispute over the resolvement of this matter, in any event. But it goes back to the exact same things over which Mr. Kokkonen was charged with, and I thought we had it all resolved. And it looks to me we're back to score one.

MR. NAPOLI: I'm hearing the same thing, what the dispute was all about, and then what was resolved on the record, and then it's unresolved. I just can't understand why this matter can't be resolved.

MR. JENCKS: I can't either. We thought it was.

THE [sic] NAPOLI: What I see in your documents and Mr. Kokkonen's comments is exactly the same thing of Mr. Isham, and what would be resolved. And here we are again.

MR. JENCKS: I mean, in my view you were all here and had that benefit. My understanding is fairly consistent concerning these 200 and some odd files that we are properly regarding and a –

THE COURT: Go ahead.

[p. 5] MR. JENKS: No. Those were pursuant to some produced. 275 of those are the same files that the defendant had subpoenaed at trial. The plaintiff brought those at trial. They are the same files that he admitted to having at his deposition, and those are the files that were produced.

THE COURT: Perhaps the Master should go out and resolve the settlement, and the losing party pay the bill.

MR. JENCKS: If the Court decides it has jurisdiction to rule on the defendant's motion, I think the special Master is appropriate in this situation.

THE COURT: Who else would have the jurisdiction to rule on the motion?

MR. JENCKS: I believe if you look at similar cases of this Court, once the action is dismissed and there is no pending matter before it, it does not under part of the decision have authority and jurisdiction to imply and enforce the settlement.

THE COURT: It's your position that the settlement is not enforceable; is that it?

MR. JENCKS: My position is a matter of law and policy and the Federal Court has diversed this action, and indefinitely it occurs in litigation before me and that would be the result in interpreting law in this court decision.

MR. NAPOLI: Your Honor?

THE COURT: Yes.

[p. 6] MR. NAPOLI: I would like to respond to just about everything he said. First of all, in my declaration as Exhibit F, Mr. Isham was still counsel of record. I informed him that he hasn't returned the files. I got a response from Mr. Isham on April the 8th saying contact Mr. Kokkonen directly, that is Exhibit B. I did so with Exhibit H. I filed the motion thereafter on May 21st.

I think ample time was given for an opposition to be filed in a timely manner, for an attorney to be apprised in



a timely manner. Indeed I was informed by Mr. Jencks that he had worked with Mr. Isham on this matter.

One thing I would like to point out in Mr. Jencks' declaration that he failed to admit or state is that on Thursday, I told him that I'm just hearing the same things that forced this case into trial. The same kind of semantics, the same kind of run-around that we have been getting. Although I will extend the courtesy in talking with my client, he expects us to move forward on the motion. We think it's ridiculous. We litigated the matter. We settled the matter in front of the judge and now we are coming back with the same arguments.

As far as having this Court having jurisdiction, I think it's absolutely ludicrous for counsel to come in here and say this is an enforceable agreement. But it's not enforceable by the judge to [p. 7] whom it was tried, and notably he absolutely has no authority to support his position. He's just trying to distinguish the best authority. That is the only point.

THE COURT: We are not going to continue this matter. We will hear arguments today and the Court will proceed. The Court is satisfied that it has jurisdiction of the law to enforce it's [sic] settlement agreement and we shall so proceed. Mr. Jencks, you had a comment?

MR. JENCKS: The only comment, my application said in the alternative either for a continuance or relief to have the response of papers filed until this matter and you ruled on the continuance. I would ask that the Court take under consideration our request that our papers be considered and accepted, and as the Court's relief that that be removed.

THE COURT: I will accept the papers. I will give the defendant ten days from today's hearing date to respond.

MR. JENCKS: Thank you, your Honor.

THE COURT: All right. Mr. Napoli?

MR. NAPOLI: Well, Your Honor, I appreciate the Court's courtesy in allowing me the time to respond. I have reviewed the papers and I would just like to make a couple of preliminary comments.

One is in connection with Mr. Jencks' declaration that he says here quote unquote that Judge Coyle had told me that Kokkonen had lied through his [p. 8] teeth. And I simply resent the fact that the comment was taken out of context and how it is being used.

Now, the way the matter went, after the trial, Judge Coyle invited all counsel including Mr. Isham into chambers. And then it was my view that Judge Coyle understood that plaintiff, Mr. Kokkonen, had been lying through his teeth regarding the files. The same files he said he didn't have, but was willing to return according to the settlement agreement. And I regret that that comment was said. I felt that was off the record and now here it appears in this declaration.

Now, with respect to the points and authorities, Your Honor, he's making the same arguments that we went through at trial. They are playing with semantics. They are talking about agency files. They are talking about my file. All we want are the Guardian files in connection with the Guardian policy holders. I will not tell the Court yet another time because the Court sat through three days of



trial. Mr. Kokkonen is playing with semantics. He doesn't want to give up the files, and that's all there is to it.

Your Honor has already ruled that it does have jurisdiction in this case. I will not comment on that aspect, and it appears that counsel says that the settlement agreement we reached is too vague to enforce. I would like to point out to the Court and counsel that this Court stated on the record during that agreement at the end of page 12 and on to page 13 when [p. 9] he asked the judge, "Do you understand the agreement?" And the court responded, "Oh, I understand."

The only other argument in here is again of semantics, playing with 200 files. Mr. Kokkonen knew very well what he was returning. He returned and terminated group files. The trial was about individual policyholder files, and this is what we want.

And to refresh Mr. Kokkonen's memory, and counsel who might not had the benefit of reviewing these exhibits, I point to Exhibit D and E of my declaration, and it says, "To an individual policyholder, your client files have not been resigned to anyone. I have them." Those are the files that we want.

We had two exhibits with letters to individual policyholders. We had Matt Kokkonen testify, "Yes, I sent out hundreds of these letters and in most cases had those files."

We just want the files back, Your Honor, and I also submit that the course of conduct has been to try to give the settlement agreement the run-around, so to speak, by playing with semantics, by refusing to respond in any

amenable way from trying to settle this. He got no less than two letters. He said, "Please, return the files."

He got a phone call from a one-time colleague who said he will give absolutely no information.

[p. 10] Your Honor, I submit that that is bad faith, and I think that Guardian is entitled to have its costs covered by bringing this motion.

THE COURT: Mr. Jencks?

MR. JENCKS: Thank you, Your Honor. I take considerable umbrage in Mr. Napoli's not cooperating in some efforts. I proposed four days ago that we have a neutral third party inventory files, and we can assess where those files belong.

THE COURT: It's not a question of assessing where they belong, it's what Mr. Kokkonen agreed to do.

MR. JENCKS: Your Honor, if I may, this counsel in this case seems to invite semantics. Well, there are three tiers of files and an original file. There's no question but that every original file has been returned and is in the possession of Guardian. There is an individual file. Sales or policy keeps a copy of that, under the agents' agreement under the contract with the Guardian. That is his property, and the Guardian policy has also been returned, and his client copy of the client file.

THE COURT: Let's assume that to be true, but Mr. Kokkonen agreed to do it in this case.

MR. JENCKS: Let me finish here. Under the general agency agreement those files are the property of the Guardian at least under their agreement. That has



been the position of the defendants, and to settle this matter we agree to return all the Guardian agency files [p. 11] in possession of Mr. Kokkonen and his agency, and that has been done.

It is my understanding there may be one or two missing according to Lisa Hyland's declaration. But over 2000 of the general agency files have been returned. And what we are talking about is the third copy of that file, and I don't think that by my understanding, and I tried to read as much as there is in my record that I can. I don't believe that the custody of that set of files which simply retracts the other two, has of [sic] been disputed in pleading with this case.

THE COURT: Let me ask you, then, what is it that you claim that Mr. Kokkonen has returned before the lawsuit? What was returned after the settlement agreement? And what it is that he refuses to return?

MR. JENCKS: Okay. He has returned, prior to the settlement, in excess of 2,000 agency files of policyholders. These were picked up by and reviewed in the office by the Guardian territorial manager, Mr. Gorman. They were picked up by the company and taken away.

In addition, Mr. Kokkonen has forwarded all original policyholder files to the office in New York, and I don't think that Mr. Napoli can testify that there is not an original file left in San Luis Obispo.

Mr. Gorman came out personally and went through the files with the agency, and there were [p. 12] several boxes that he left, because he realized they were terminated or lapsed files, but they were left behind.

In the questioning, both at the deposition and at trial, Mr. Kokkonen was asked: "Do you still have any Guardian agency files? Do you have any files belonging to the agency in your possession?" Mr. Kokkonen answered: "Honestly, yes, I do. Approximately 200."

That turned out to be 275. Those were returned one month following the settlement, pursuant to the settlement. The only files that there seems to be a dispute about is whether Mr. Kokkonen still has individual agency files. And the agreement also provides, as you will recall, Mr. Kokkonen can keep copies of new files.

This third file is just a copy. They have the general agency file. They have the original file. They also testified, I believe, at trial that the ones missing they spent a considerable amount of time reconstructing them.

I don't believe Guardian is out a file on this, and Mr. Kokkonen has complied with what he understood to be the property of Guardian or at least their possession. And the date on the agency files, because that is what's under that, are totally different contracts for the agent and the general agent.

All those files have been – all the [p. 13] general agency files have been returned. And in the declaration there are no remaining files, general agency files, at his place of business. And they have all been returned either through Mr. Gorman's initial pick up or through his 275 last month.

Let me – I hear my voice raising with great emotion. As I indicated, I thought this and some other settlement



problems which I read in our papers could best be settled without returning to this forum. I was obviously wrong.

And if it's this Court's persuasion in this to enforce this agreement, I guess this is the forum for us to bring our motions on enforcing other provisions of the Court, and provisions of this agreement.

The one thing maybe we hope we all have in common, is we would like to see this case put to sleep. Even Mr. Napoli and I apparently agree on that.

And give me a couple of minutes – I would invite you to look at the Springpark case. If Mr. Napoli says I did not offer any authority for my jurisdiction, and someone in his office found and related to the settlement enforcement, the facts are very clear both had existing pending matters before the Court and questions to the Court as part of its jurisdiction under a separate matter to enforce a collateral settlement agreement.

There is a couple other depositions to [p. 14] enrich or enforce it. Both of the previous settlements in the Court order and motion enforcing the Court order wasn't even in the private contract.

In this matter, Your Honor has ruled and I just wanted to point out those authorities and clearly a reading of both Springpark and Decanay rely heavily on a court district case called, "Meetings and Conventions." I can supply your clerk with the cite.

It is very consistent that the mere settlement, enforcement of settlement, does not confer with jurisdictional court. I don't think that the Court has allowed Mr. Napoli

to respond. So I don't want to just reiterate and put forth my papers. All right.

THE COURT: Mr. Napoli, anything further?

Is there any further concerns about other aspects referring to continued contacts that have been resolved?

MR. NAPOLI: Quite frankly, Your Honor, he did send one letter that we did take issue with. We wrote him a letter, and he responded to it, and he has not, in terms of writing Guardian directly, and asking him to do things for information, he has not continued in that Court. There was some other issues developing, but they were not encompassed by this lawsuit, and I'm not going to bring that to the attention of the Court now because this is not by this lawsuit or by this settlement agreement.

THE COURT: Is there anything further before I decide?

[p. 15] MR. NAPOLI: Just very quickly, Your Honor. We just heard an explanation of what files have been returned to Guardian. What files are supposed to be returned to Guardian. What files of Matt Kokkonen?

With all due respect to counsel, who was not at the trial, the files that Mr. Kokkonen had left behind have not been in their show. That speaks for itself. He said that Matt Kokkonen came on up to him and said, "Look at these." Which Mr. Gorman was not paying attention to them, and those are not files that are of issue.

He tries to play again with semantics which is seemingly what this case has been built upon that the home office has the originals. I have my copies. They can't have my copies. I gave them agency files.



All agency files are, Your Honor, are the files that a certain office maintains in connection with the Guardian policyholders. They are group files which he returned. Terminated group files is actually what he returned. They are of no value. Whether they are an individual policyholder, they are all agency files.

The one thing he has not returned, are individual policyholder files. Those were the lists that we used at trial. Those are the policies he has not returned. The same policies he's referring to, are the two exhibits that I attached to my declaration. [p. 16] That is all we want.

MR. JENCKS: Nothing further, Your Honor.

THE COURT: All right. The matter will be taken under submission. Plaintiff will have an opportunity to respond to advise the Court and the Court will advise Mr. Jencks.

MR. JENCKS: Excuse me, Your Honor. There is a practical matter about the filing that I attached to the exhibit to this application. Can I have the original of these three documents? The Court indicated that I could file them.

MR. NAPOLI: Do I have ten days to file a response to this?

THE COURT: Yes.

MR. NAPOLI: Thank you, Your Honor.

THE COURT: Anything further?

MR. NAPOLI: No.

MR. JENCKS: No.

THE COURT: The matter stands submitted.

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[p. 17]

STATE OF CALIFORNIA, )
) ss.
COUNTY OF TULARE, )

I, GABRIELLE BROOKS TOMLINSON, C.S.R. 7867, do hereby certify that the within transcript contains a full, true, and correct transcript of my shorthand notes, and a full, true, and correct transcript of the proceedings had in the matter and on the date as set forth on the first page hereof.

DATED: Aug. 11th, 1992. Visalia, California.

/s/ Gabrielle Brooks Tomlinson
GABRIELLE BROOKS TOMLINSON,
C.S.R. No. 7867

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| MATT KOKKONEN<br><br>Plaintiff,<br><br>v.<br><br>THE GUARDIAN LIFE INSURANCE CO. OF AMERICA, THE GUARDIAN INSURANCE AND ANNUITY CORP., THE GUARDIAN INVESTOR SERVICES CORP.<br><br>Defendants. | ) No. CV-F-90-325-REC<br>ORDER ENFORCING SETTLEMENT AGREEMENT |

On June 29, 1992, the court heard The Guardian's motion to enforce the settlement agreement. Upon due consideration of the written and oral arguments of the parties, the court now enters its order as set forth herein.

I. Background

This case settled just before the jury was instructed. The terms of the settlement were stated for the record as follows:

> THE COURT: Who wishes to make the statement for the record . . . ?
>
> MR. DOLINKO: . . . [The] [c]ase is settling under the following conditions.
>
> There will be mutual dismissal with prejudice of all claims by both sides . . .

. . . .

It's further agreed that Mr. Kokkonen is not going to be sending any forms, either from himself, or be providing his quote, unquote, "clients" with any forms in order for him to request information from the Guardian. Of course, if a client of the Guardian has a request for information and puts it on their own letterhead or whatever other way they have of communicating a request for information, they're free to do so, and we will respond – the Guardian will respond to that particular quote, unquote client. Any requests for information about Guardian policyholders who are serviced out of the San Luis Obispo agency are to go to the San Luis Obispo agency. The response will go to the policyholders.

> Mr. Kokkonen, to the extent he has any Guardian files or files containing information regarding Guardian policyholders, will turn over those files, but he will be allowed to copy them and retain those copies for his own records, whatever he has now.

Transcript 2:10-3:18.

The parties agreed that the files would be turned over on April 6, 1992. With regard to Kokkonen's delivery of the files on April 6th, Carl Hagmaier, an employee of The Guardian, declares,

> On April 6, 1992 at approximately 4:50 p.m. I noticed Matt Kokkonen and his secretary Lisa Hyland approaching the front entrance of The Guardian's office building . . . Ms. Hyland was carrying a cardboard box filled with files which she placed just outside the entrance of the office



> building next to another cardboard box with files which had already been placed there. As Ms. Hyland approached the entrance of the building, I saw Mr. Kokkonen approximately ten feet behind her. Mr. Kokkonen did not approach the entrance of the building . . . Ms. Hyland . . . requested that I sign a form stating Mr. Kokkonen had returned 275 files. I stated I could not sign the form until I first counted the files. Ms. Hyland then asked me if I would sign the form if it was modified to state "approximately 275 files." I said I would do so . . .
>
> Immediately after Ms. Hyland and Mr. Kokkonen left . . . I brought the two boxes into the office and examined the files. I noticed that they were all yellow-labeled files. Our office uses yellow labels on files to distinguish them as group insurance files. Upon closer examination, I noticed all the files were in connection with terminated group insurance policies and therefore are of no real value to The Guardian.
>
> I also noticed that Mr. Kokkonen had failed to return any of the individual life insurance policy files or the individual disability insurance files. It was these individual life insurance policy files and individual disability insurance files that I expected Mr. Kokkonen would return to The Guardian pursuant to the settlement reached in court.

Hagmaier Decl. 2:7-3:10.

Kokkonen has never disputed that he has the files in question. As a matter of fact, he admitted to possessing

these files in court and at his deposition.[1] He also admitted to writing a form letter to hundreds of clients in which he stated, "I am still in the business. Your client files have not been reassigned to anyone. I have them." Kokkonen admitted to possessing the files of many of the addressees of the form letters.

James Napoli, counsel for The Guardian, informed Richard Isham, Kokkonen's attorney, that Kokkonen had failed to return all files as provided by the settlement

[1] Q: Do you have any Guardian agency files in your possession?
A: Would you explain your question a little more, please.
Q: The agency files in connection with Guardian policyholders, do you have any of those files in your possession?
A: Yes.
Q: Approximately how many?
A: That's very hard for me to say, but perhaps I can say a couple of hundred right off the top of my head.
Q: Okay, that's fair enough. Subsequent to your termination as a general agent of The Guardian, did you deny Guardian agents access to agency files . . .
A: Yes.
Q: . . . of Guardian policyholders?
A: I denied them unlimited access to client files in my agency, to my agency files.
Q: And those agency files are regarding Guardian policyholders?
A: Yes.
Mtn. 3:25-4:23.



agreement, and that he had also violated the settlement agreement by sending correspondence to The Guardian, on his letterhead and signed by him, directing The Guardian to engage in activity on behalf of a Guardian policyholder. Isham subsequently informed Napoli that he no longer represented Kokkonen. Napoli then sent a letter directly to Kokkonen to which Kokkonen did not respond. The letter stated,

> On April 6, you were to return *all* The Guardian files in your possession, including: life insurance files; disability insurance files; and group insurance files. Unfortunately, you only returned certain group insurance files and have failed to return the life insurance files and the disability insurance files . . .
>
> . . . .
>
> [Y]ou have also violated the settlement agreement by sending correspondence on your own letterhead signed by yourself directly to the San Luis Obispo office directing them to engage in activity on behalf of a Guardian policyholder. The Guardian will not tolerate any further correspondence of this nature from you.

The Guardian contends that Kokkonen has refused to return the files in bad faith and requests that the court (1) order him to return the individual policyholder files to its San Luis Obispo office; and (2) sanction him for his bad faith conduct in the amount of attorney's fees incurred in connection with this motion.[2] *Chambers v. Nasco, Inc.*, ___

[2] James Napoli declares that his billable rate is $165.00 per hour and that he has spent ten hours preparing his motion and

U.S. ___, 111 S.Ct. 2123, 2133 (1991) (a court may assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons).

Kokkonen filed his opposition to The Guardian's motion on the day of the hearing. Therein he (1) challenged the court's jurisdiction to enforce the settlement agreement; (2) asserted that he has complied with the settlement agreement insofar as it required him to return "agency files;" (3) challenged the agreement as being "fatally uncertain[];" (4) accused The Guardian of acting in bad faith for refusing to, in effect, renegotiate the settlement agreement; and (5) questioned the impartiality of this court.

The court has duly considered Kokkonen's arguments and finds all of them seriously wanting. First, as the court determined at oral argument, there is no doubt that it has jurisdiction to enforce the settlement agreement. As recently as last year the Ninth Circuit reaffirmed the inherent power of the district courts to enforce settlement agreements. *Wilkinson v. FBI*, 922 F.2d 555, 557 (9th Cir. 1991). *See also, The Matter of Springpark Associates*, 623 F.2d 1377, 1380 (9th Cir. 1980) ("[t]he authority of a trial court to enter a judgment enforcing a settlement agreement has as its foundation the policy favoring the amicable adjustment of disputes and the concomitant avoidance of costly and time-consuming litigation"), quoting *Dacanay v. Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978).

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reply. Accordingly, The Guardian requests $1,650.00 plus additional fees incurred in connection with Napoli's court appearance.



Second, the assertion that the terms of the settlement are fatally uncertain is ridiculous. Kokkonen was present at the settlement negotiations and participated in an explanation of the terms of the settlement agreement on the record. He expressed no concern as to the certainty of the agreement at the time, and no uncertainty can fairly be said to exist now.

Third, the court wholeheartedly disagrees with Kokkonen's assertion the settlement agreement concerned only "agency files." The court has no trouble recollecting that Kokkonen was to turn over *all* Guardian files in his possession. This recollection is substantiated by the above-quoted portion of the transcript. Furthermore, for Kokkonen to state that he has turned over all "agency files" simply indicates that there are other files, e.g., "agent's files," which Kokkonen has not returned.

The last two elements of Kokkonen's argument barely deserve mention. Kokkonen has provided no authority for the proposition that The Guardian's refusal to re-negotiate the settlement agreement would constitute bad faith. Indeed, the court is incredulous that Kokkonen would even suggest that the agreement be re-negotiated. As for this court's impartiality, the court believes that its objectivity cannot seriously be questioned in light of the record. In any event, no motion to recuse has been filed.

The court finds that Mr. Kokkonen has been stubbornly and unjustifiably uncooperative in refusing to comply with the terms of the settlement agreement. Mr. Kokkonen has, in fact, blatantly breached the terms of the settlement agreement by writing to The Guardian on behalf of a policyholder as well withholding files that he

agreed to return. The court will not tolerate such behavior.

ACCORDINGLY, IT IS ORDERED that Mr. Kokkonen shall *immuediately* [sic] turn over *all* files of The Guardian's, whether they are known as "agent's files," "agency files" or some other name, which are in his possession or to which he has access. In accordance with the settlement agreement Mr. Kokkonen may keep only newly made *copies* of these files. IT IS FURTHER ORDERED that Mr. Kokkonen shall cease writing to The Guardian on behalf of policyholders. IT IS FURTHER ORDERED that Mr. Kokkonen shall pay The Guardian's attorney's fees incurred in connection with this motion in the amount of $1,650.00 plus travel and court appearance expenses. THE COURT HEREBY WARNS Mr. Kokkonen that if he refuses to comply with the terms of the court's order and/or the terms of the settlement agreement he may be found in contempt.

DATED: August 19, 1992

/s/ Robert E. Coyle
ROBERT E. COYLE
United States District Judge

[Proof Of Service Omitted In Printing]

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No. 92-16628

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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MATT T. KOKKONEN,
Plaintiff/Appellant

vs.

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA; THE GUARDIAN INSURANCE AND ANNUITY CORPORATION; THE GUARDIAN INVESTOR SERVICES CORPORATION;
Defendants/Appellees

---

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THE HONORABLE ROBERT E. COYLE,
PRESIDING
CASE NO. CV-F-90-325-REC

---

# BRIEF FOR PLAINTIFF/APPELLANT MATT T. KOKKONEN

---

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## I.

## STATEMENT OF SUBJECT MATTER JURISDICTION, APPEALABILITY AND TIMELINESS OF THE APPEAL

Plaintiff/Appellant Matt T. Kokkonen ("Kokkonen") contends that the district court was without subject matter jurisdiction to order enforcement of certain terms of an oral settlement agreement entered into between Kokkonen and all Defendants/Appellees (collectively referred to as "The Guardian") that terminated the litigation between the parties (CR 98). This Court has jurisdiction over this action as well as an independent duty to review whether the district court had subject matter jurisdiction to enforce the settlement agreement between Kokkonen and The Guardian. *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 165, 79 L.Ed. 338 (1934); *Othman v. Globe Indem. Co.*, 759 F.2d 1458, 1460 (9th Cir. 1985).

Kokkonen appeals from the Order Enforcing Settlement Agreement ("Order") ordered by the district court on August 19, 1992 and entered on August 20, 1992 (CR 98). This district court order is a final decision and appeal from it is of right, pursuant to 28 U.S.C. § 1291. Kokkonen filed a Notice of Appeal from the Order on September 15, 1992, twenty-six (26) days after entry of the Order (CR 100); therefore, the appeal is timely under 28 U.S.C. § 2107 and Federal Rules of Appellate Procedure, Rule 4(a)(i). The Court also granted Kokkonen an extension of time to file his appellant's brief; thus, this brief is timely. *See* Excerpt of Record.)



## II.

## STANDARD OF REVIEW

The appellate court reviews *de novo* a district court's decision on subject matter jurisdiction over the action. *McClendon v. U.S.*, 885 F.2d 627 (9th Cir. 1989); *Peter Starr Prod. Co. v. Twin Continental Films, Inc.*, 783 F.2d 1440, 1442 (9th Cir. 1986); *In re Suchy*, 786 F.2d 900, 901 (9th Cir. 1985).

## III.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

Plaintiff's appeal focuses on one issue: whether the district court had subject matter jurisdiction to enforce an oral settlement agreement entered into between the parties when: 1) the entire case had been dismissed *with prejudice* months prior to the application for enforcement of the settlement agreement, 2) the settlement agreement had never been incorporated into an order or judgment of the court, 3) the court had not retained jurisdiction over the action, and 4) no other independent grounds for federal court jurisdiction existed.

## IV.

## STATEMENT OF THE CASE

### A. Summary of Procedural Background and Disposition of Case.

Kokkonen filed a civil complaint against the defendants The Guardian in California Superior Court for the

County of Tulare in April 1991. In May 1991, The Guardian filed for removal of the action to federal district court on the grounds of diversity jurisdiction (CR 1) and later counter-claimed against Kokkonen (CR 28). The action proceeded to trial on the merits in the United States District Court for the Eastern District of California before the Honorable Robert E. Coyle. During trial, Kokkonen and The Guardian reached an oral settlement of their action. The parties discussed the terms of the settlement before the Court, and then filed a stipulation and order mutually dismissing with prejudice their respective causes of action (CR 83). The district court then dismissed the case with prejudice in April 1992 (CR 83).

The Guardian later moved the district court for an order summarily enforcing the oral settlement agreement (CR 84). Kokkonen opposed the motion, claiming, among other grounds,[1] that the district court lacked subject matter jurisdiction to decide the Motion to Enforce Settlement Agreement (CR 89-91). The district court determined that it had subject matter jurisdiction and ruled that Kokkonen had violated certain terms of the settlement agreement (CR 97, 98). It ordered him immediately to comply with certain terms of the settlement agreement and awarded fees and costs (CR 98, p. 7). It is from this Order enforcing the settlement agreement that Kokkonen appeals.

[1] Plaintiff also argued in his opposition that: 1) he had complied with all of the terms of the settlement agreement; 2) the settlement agreement was fatally uncertain and indefinite and could not be enforced; and 3) Defendants had brought the motion to enforce the settlement agreement in bad faith.



B. Summary of Factual Background.

Kokkonen filed a complaint against The Guardian, alleging various causes of action arising out of his former employment relationship with The Guardian, such as wrongful termination, interference with prospective business advantage and fraud (CR 12). The Guardian successfully removed the case to federal district court and counter-claimed on issues related to the employment relationship (CR 1, 28). Specifically, the parties disputed the rights to certain files maintained by Kokkonen in his status as an independent contractor insurance agent for The Guardian and the ability of Kokkonen to contact The Guardian on behalf of his Guardian policyholder clients (CR 12, 28). These issues of access to information from The Guardian and ownership of certain insurance files continue to haunt the parties to this day.

The case proceeded to trial in March 1992. After closing arguments, but before the jury had been instructed, the parties arrived, or believed they had arrived, at a settlement agreement (CR 82). Counsel for the parties discussed the terms of the settlement agreement on the record before the district court during the trial (CR 82). The terms that counsel used to define the obligations of the parties under the settlement agreement, however, were very vague and imprecise (CR 82). The settlement agreement was never further clarified or reduced to writing (CR 89).

The parties then signed a stipulation and order of dismissal voluntarily dismissing with prejudice their claims against each other, pursuant to Federal Rules of

Civil Procedure, Rule 41(a)(1)(ii) (CR 83). The settlement agreement was never referred to in the order of dismissal, nor was it otherwise made part of an order or a judgment of the district court (CR 83). The court ordered the entire case dismissed with prejudice on April 13, 1992 (CR 83).

Later, after the court had dismissed the entire case with prejudice, the Guardian moved the district court to summarily enforce the settlement agreement, alleging that Kokkonen had not complied with certain terms of the agreement (CR 84). The district court dismissed Kokkonen's arguments that it no longer had subject matter jurisdiction to summarily enforce the settlement agreement (CR 89). After determining that it had jurisdiction, the court ruled that the order was sufficiently clear to summarily enforce and that Kokkonen had not complied with all of the terms of the agreement (CR 98). It then ordered him immediately to comply with certain terms and awarded The Guardian fees and costs (CR 98, p.7).

## V.

## ARGUMENT: THE DISTRICT COURT DID NOT HAVE JURISDICTION TO ENFORCE THE SETTLEMENT AGREEMENT ENTERED INTO BETWEEN THE PARTIES

### A. The Appellate Court Must Determine Independently Whether the District Court had Jurisdiction Over the Action.

"Federal courts are not courts of general jurisdiction;. . . . For that reason, every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,'. . . . *Bender v. Williamsport Area*



*School Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986), *citing Mitchell v. Maurer*, 293 U.S. at 244. *Accord Othman*, 759 F.2d at 1460; *Schlegel v. Bebout*, 841 F.2d 937 (9th Cir. 1988) (appellate court has an independent obligation to determine whether jurisdiction exists).

The appellate court's jurisdiction on appeal when the lower federal court lacks jurisdiction is only to correct the error of the lower court in hearing the action. *Bender*, 475 U.S. at 541; *United States v. Corrick*, 298 U.S. 435, 440, 56 S.Ct 829, 80 L.Ed. 1263 (1936). *See also Glasstech, Inc. v. Ab Kyro Oy*, 769 F.2d 1574, 1577 (Fed. Cir. 1985) ("It is beyond debate that an appellate court has no jurisdiction to decide the merits of the case if the court from which the appeal was taken was without jurisdiction.") Therefore, Kokkonen seeks only a determination from this Court that the district court was without subject matter jurisdiction to enforce the settlement agreement, and requests that it vacate the Order due to the district court's lack of jurisdiction.

### B. This is an Issue of First Impression for the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit has held that it is well-settled that a district court has the "inherent power summarily to enforce a settlement agreement with respect to an action pending before it." *In the Matter of Springpark Associates*, 623 F.2d 1377, 1380 (9th Cir.), *cert. denied*, 449 U.S. 956, 101 S.Ct. 364, 66 L.Ed.2d 221 (1980) (quoting *Dacanay v. Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978)). *Accord In re Suchy*, 786 F.2d at 902-903; *Eitel v. McCool*, 782 F.2d

1470,1473, fn. 4 (9th Cir. 1986); *Waits v. Weller*, 653 F.2d 1288, 1291, fn. 4 (9th Cir. 1981).

However, it has never squarely addressed whether a district court has jurisdiction to enforce a settlement agreement in an action which is no longer pending before it, which has not been incorporated into an order or judgment of the court, in which the court has not retained jurisdiction to enforce the settlement agreement or in which the court does not have an independent basis for jurisdiction. *See McClendon v. U.S.*, 885 F.2d at 632-633 (the Court did not need to decide whether a district court has inherent jurisdiction to enforce the terms of a settlement agreement solely because the settlement agreement terminated litigation which was originally brought before the district court or whether the district court had somehow retained jurisdiction over the action since the case could be decided on grounds of sovereign immunity). *See also Backers v. Bit-She*, 549 F. Supp. 388, 389 (N.D. Cal.1982).

In cases that have been brought before the Court of Appeals for the Ninth Circuit regarding subject matter jurisdiction to enforce a settlement agreement, the Court has been able to resolve the issue of jurisdiction without addressing the issue now present before it. In *Dacanay*, the settlement agreement which had purportedly been reached between the parties was breached *before* it had been submitted to the court for approval and before the case had been dismissed or any final judgment was entered. As such, the action was *pending* before the district court. *Dacanay*, 573 F.2d at 1077. Therefore, the court had jurisdiction to enforce this settlement agreement



because the action was "pending before it." *Dacanay*, 573 F.2d at 1078.

In *Springpark*, the stipulation which settled the action between the parties was incorporated into an order of the court. All of the terms of the settlement agreement were set forth in a stipulation which was made a court order. *Springpark*, 623 F.2d at 1379. By a separate order, the district court then dismissed that action. *Id.* In ruling that the district court had jurisdiction to enforce the terms of the settlement agreement, which had been set forth in the order, the court quoted the *Dacanay* language cited above with approval and then held that the debtor "is now bound by that settlement and order." *Springpark*, 623 F.2d at 1380.

In *In Re Suchy*, the original action involved debtors borrowing money from lenders, lenders foreclosing on the loan, debtors filing for bankruptcy and receiving an automatic stay on the foreclosure, and debtors then entering into a stipulation with lenders to vacate the stay and permit the foreclosure if payments were not timely made. After the debtors failed to make payments again and the lenders foreclosed, debtors tried to file a cross-claim against lenders for fraudulent misrepresentation and equitable relief. The district court ruled that it did not have subject matter jurisdiction over the cross-claim because it did not "relate to" the bankruptcy proceeding. This Court agreed.

However, this Court held that the district court *did* have subject matter jurisdiction to summarily enforce the settlement agreement entered into between the lender and the debtor in the original action because the action

was still pending before it. *See In Re Suchy*, 786 F.2d at 901-903.

Similarly, in *Waits* and *Eitel*, the Ninth Circuit noted that the district court had authority to approve and enforce a settlement agreement entered into by the parties to an action before it because the case was pending before the district court at the time. *Waits* at 1291, fn. 4; *Eitel* at 1473, fn. 4.

Another related, although distinguishable, case is *Wilkinson v. FBI*, 922 F.2d 555 (9th Cir. 1991). In *Wilkinson*, the parties had entered into several stipulations which collectively comprised the parties' settlement agreement. The parties had agreed that in exchange for the release of all claims against the defendants, the defendants would produce thousands of pages of documents. The district court entered final judgment and dismissed the remaining claims. It is unclear whether the final judgment referred to or incorporated the stipulations into it. However, the district court appears to have clearly retained jurisdiction to enforce the settlement agreement by agreeing when it approved the parties' settlement agreement to review the production of documents and "hear and resolve" disputes over the production of documents. *Wilkinson*, 922 F.2d at 559.

One month later, the plaintiffs filed a motion to compel further production of documents. The defendants claimed that the district court did not have subject matter jurisdiction to hear the motion. The defendants, however, appear to have raised subject matter jurisdiction only with regard to: 1) whether the motion, as a discovery



motion, was timely filed or not and 2) whether the order appealed from was final.

The appellate court did not analyze whether the district court had subject matter jurisdiction over the enforcement of the settlement agreement after the district court dismissed the action. Nor did it address whether the district court had retained jurisdiction to hear disputes regarding compliance with the settlement agreement. Instead, it addressed the jurisdiction issue by stating that the motion was not a discovery motion in the usual sense; therefore, it did not need to be brought within ten days of entry of final judgment. *Wilkinson*, 922 F.2d at 557. It then summarily concluded that "[d]istrict courts have the inherent power to enforce settlement agreements," citing *In Re Suchy* and *Springpark*. *Id.* As discussed above, neither of these cases stood for this all-encompassing position. The appellate court engaged in no further analysis of this aspect of jurisdiction.

The court then addressed whether it had jurisdiction. It analyzed "whether the denial of a *post*-judgment motion to compel production of documents, brought to enforce a settlement agreement, is final and appealable." *Wilkinson*, 922 F.2d at 558 (emphasis in original). The court concluded that the denial of the motion was a final, appealable order; therefore, it had jurisdiction. *Id.*

The court's reasoning in *Wilkinson* does not stand for the proposition that a district court has subject matter jurisdiction to summarily enforce a settlement agreement that had terminated litigation in an action originally brought before the district court. A cursory reading of *Wilkinson* might suggest this; however, upon a close

review of the facts of the case, it is clear that the district court retained jurisdiction to hear disputes regarding the adequacy of the defendants' production of documents. *Wilkinson*, 922 F.2d at 559. The various stipulations, which were all part of the "settlement agreement" between the parties, provided *explicitly* for the district court to " 'hear and resolve' " their disputes as to the adequacy of the defendants' compliance and to review defendants' claims of privilege. *Id.*

Although the Ninth Circuit has not directly addressed this issue, a district court in California has. The situation presented before the court in *Backers v. Bit-She* is **identical** to that present in the instant case. In *Backers*, just as in the case before the Court, the parties entered into a settlement agreement and the court ordered dismissal of the action with prejudice. "The order neither incorporated nor referred to the settlement agreement." *Backers*, 459 F. Supp. at 388. Plaintiff then moved the district court to enforce the settlement agreement. The court declined, holding that because the agreement had not been incorporated into an order or judgment of the court and the plaintiffs had not asserted any other basis for federal jurisdiction, the court lacked subject matter jurisdiction to enforce the settlement agreement. *Id.* at 389.

It based its decision on the Court of Appeals for the Fourth Circuit's reasoning in *Fairfax Countywide Citizens Ass'n v. Fairfax County*, 571 F.2d 1299 (4th Cir.), *cert. denied* 439 U.S. 1047, 99 S.Ct. 722, 58 L.Ed.2d. 706 (1978), wherein the Fourth Circuit held that "the district court was not empowered to enforce a settlement agreement



'unless the agreement had been approved and incorporated into an order of the court, or, at the time the court is requested to enforce the agreement, there exists some independent ground upon which to base federal jurisdiction.' " *Backers*, 549 F. Supp. at 389, quoting *Fairfax*, 571 F.2d at 1303. (*See* Section V.C.1. below, for a fuller discussion of *Fairfax*.)

A district court in Washington state also held that it would not enforce a settlement agreement between the parties after the case had been dismissed sixteen months earlier because the agreement was not incorporated into the order of dismissal. *See Denali Seafoods, Inc. v. Western Pioneer, Inc.*, 92 F.R.D. 763, 764 (W.D. Wash. 1981). As the court there explained, "[the] agreement was not incorporated into the order of dismissal; rather, it was an independent contract entered into by the parties. Hence, the agreement never had the force, effect or weight or an order of this court . . . it is preferable to leave the parties where they put themselves." *Denali*, 92 F.R.D. at 764.

This makes sense, since the district court had no reason to expand its jurisdiction in an instance where the parties, months later, wished to make the district court address issues in a case that was no longer pending or otherwise properly before the court. To expand the district court's limited jurisdiction in such situations would be, in essence, to create limitless jurisdiction for the district court. Months, and even years, down the road, the parties would be appearing before the federal judge, requesting that court to arbitrate their contract disputes.

It makes even more sense not to expand the district court's jurisdiction in the case present before the Court,

because the settlement agreement is not in writing, let alone part of an order or judgment of the court, and its wording is very vague and imprecise. In such an instance, the district court would literally be begging the parties to appear before it again, on its crowded docket, as a continuing referee to hear the parties' disputes over the terms and conditions of the settlement agreement. Because the parties are in an ongoing relationship that involves the issues of the settlement agreement (ownership of files and communications to The Guardian), each time one of the parties sought enforcement of terms of the agreement, the district court would have to hear a "mini-trial" on the parties' understanding of the agreement.[2] This Court should not create such limitless jurisdiction.

C. Other Courts of Appeal which Addressed this Issue have Held that the District Court does not Have Jurisdiction to Enforce a Settlement Agreement in This Type of Situation.

1. The Fourth Circuit Court of Appeals.

*Fairfax* involved a fact situation identical to the one in *Backers* and also the one present here before the Ninth Circuit on appeal: the parties had entered into settlement agreements which resolved their federal court action and

[2] In such situations where the parties dispute the terms of the settlement agreement, the courts agree that the district court does not have the power to summarily enforce the settlement agreement, but rather must conduct an evidentiary hearing first as to the terms of the agreement. *Kukla v. National Distillers Products Co.*, 483 F.2d 619, 621-622 (6th Cir. 1973); *Autera v. Robinson*, 136 U.S.App.D.C. 216, 419 F.2d 1197,1200 (1969).



the court dismissed the action. However, the dismissal orders did not mention that the parties had entered into settlement agreements "and they neither approved nor incorporated either settlement agreement." *Fairfax*, 571 F.2d at 1301. Based on these facts, when the plaintiffs later moved the district court to enforce the settlement agreements, the Fourth Circuit held that the district court did not have subject matter jurisdiction to enforce a settlement agreement in an action which the court had already dismissed with prejudice and the agreement had not been approved and incorporated into an order of the court, the court had not retained jurisdiction to enforce the agreement, and there was no other independent ground upon which to base federal jurisdiction. *Id.* at 1303.

The Fourth Circuit stressed in *Fairfax* that district courts are courts of limited jurisdiction, and the district court must have proper jurisdiction before it can hear the case or controversy. *Id.* The burden of establishing jurisdiction is on the party claiming it. *Id.*, citing *McNutt v. General Motors Accept. Corp.*, 298 U.S. 178, 182-183, 56 S.Ct. 780, 80 L.Ed. 1135 (1936).

It further held that the "inherent power" of a district court to enforce settlement agreements *presupposes* the existence of federal jurisdiction over the case or controversy. *Fairfax*, 571 F.2d at 1304. Because the case had been dismissed, the settlement agreement was not incorporated into the order of dismissal and no other grounds for federal jurisdiction were shown, the settlement agreement amounted to nothing more than a private contract between the parties. *Id.* at 1303. Therefore, absent another independent ground for federal jurisdiction, the district

court had the authority under Federal Rules of Civil Procedure, Rule 60(b)(6) ("Rule 60(b)") to vacate the dismissal and return the case to the court's docket, but it did not have jurisdiction to enter an order enforcing the settlement agreement. *Id.* at 1303, 1305-1306.

According to the court, because the settlement agreement terminating the litigation of a federal claim is a private contract between the parties, the plaintiff, beside filing a Rule 60(b) motion requesting the district court to vacate its dismissal, has another remedy in such a situation where it claims breach of a settlement agreement: it could file a breach of contract claim in state court. "Because enforceability is likely to turn on questions of state law, the state court is an appropriate forum for resolving this dispute." *Id.* at 1305. In fact, the court noted that if the plaintiff had filed a new complaint in the district court alleging breach of contract and seeking specific performance, the court would have dismissed the complaint on jurisdictional grounds. *Id.* at 1303. Likewise, if the parties had entered into the agreement without filing the litigation in district court, the federal district court would have been without jurisdiction to enforce the settlement agreement. *Id.*

The same is true in the case before the Court: had Kokkonen and The Guardian entered into a settlement agreement without having filed their respective complaint and counter-claim, the district court would not have had jurisdiction to enforce the settlement agreement, absent the federal amount in controversy. The settlement agreement is a simple contract between the parties, and breach of that agreement is governed by state law. Simply because the district court once heard their



case does not automatically convey limitless jurisdictional power to the district court to hear all motions relating to the settlement agreement in perpetuity once the case is no longer pending before the court and the court has not otherwise retained or obtained jurisdiction. The district court must have some grounds for its jurisdiction.

2. The Seventh Circuit Court of Appeals.

Similarly, the Court of Appeals for the Seventh Circuit ruled in *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985) that a district court does *not* have jurisdiction over a dispute involving a settlement agreement "merely by virtue of having had jurisdiction over the case that was settled." *McCall*, 777 F.2d at 1185. The *McCall* court held that there is no inherent federal jurisdiction to enforce agreements to settle federal suits. *Id.* at 1189. There must be some independent form of jurisdiction within the court, such as a deliberate retention of jurisdiction by the court, if the settlement agreement by which the federal case was dismissed is to be enforceable in federal court. *Id.* at 1187-1189. An unconditional dismissal of the federal case *terminates* federal jurisdiction except for the limited purpose of reopening the case and vacating the order of dismissal pursuant to Rule 60(b). *Id.* at 1190.

Therefore, the Seventh Circuit held that once the case was dismissed, the federal court no longer had jurisdiction over the matter, unless the court had retained jurisdiction or had an independent reason for jurisdiction. *Id.* at 1187. According to the Seventh Circuit, the settlement agreement was merely a private contractual matter

between the parties, and a breach of this agreement or any dispute relating to it would be remediable under a state court action, not federal law, unless diversity jurisdiction existed. *Id.* at 1185-1186.

A party also could move the court pursuant to Rule 60(b) to vacate the dismissal of the action and reinstate it to the active case list. However, this reinstatement still does not give the district court power to order a party to comply with the settlement agreement. *Id.* at 1186.

The Seventh Circuit again addressed whether a district court had jurisdiction to enforce a settlement agreement after it had dismissed the action in *United Steel Workers v. Libby, McNeil & Libby,* 895 F.2d 421, 423 (7th Cir. 1990). In *Steel Workers,* the order of the district court dismissing the action with prejudice was signed by the court and stated that the court had approved the settlement entered into by the parties. The order then dismissed the complaint and counter-claim with prejudice. The issue before the court was whether this statement of approval of the district court constituted a retention of jurisdiction by the court over the settlement agreement.

The court applied its reasoning from *McCall-Bey,* and stated that "Rule 41(a)(2) of the Federal Rules of Civil Procedure does not confer authority on federal district judges to enforce the terms of settlement agreements that may have motivated the parties to seek voluntary dismissal of the suit." *Id.* at 423, quoting *McCall-Bey,* 777 F.2d at 1189. Therefore, if the federal court had jurisdiction over the settlement agreement, it must rest on some other grounds of jurisdiction, such as a retention of jurisdiction over the agreement by the district court. *Id.* The court



held: "to the extent a settlement agreement is *incorporated* into a court's final judgment or order, the district court retains jurisdiction to interpret that agreement and order its enforcement." *Id.* at 423 (emphasis added). On the facts before the court, it found:

> "[t]here is nothing in the brief order of dismissal entered by the district judge . . . which indicates or provides any inference that he intended to retain jurisdiction over the completion of the parties' agreement. . . . While asking a judge to approve and sign a negotiated settlement agreement may be fairly common and acceptable practice . . . it does not constitute a grant of retained jurisdiction. *Id.*

Because the district court did not retain jurisdiction in its order and the order did not incorporate the settlement agreement within it, the Seventh Circuit found that the district court had no jurisdiction to clarify or enforce the agreement. *Id.* at 424. The facts found in the case before this Court are even more compelling in finding that the district court did not retain jurisdiction over the settlement agreement: the Stipulation and Order of Dismissal did not even *mention* the settlement agreement, let alone incorporate it by reference or otherwise express any retention of jurisdiction (CR 83). Nor did, or could, the court approve and sign the settlement agreement, as was done by the district court in *Steel Workers,* because the settlement agreement between the parties here is not even in writing. Thus, the district court in this action clearly did not retain jurisdiction over the settlement agreement, so it was without jurisdiction in hearing the motion to enforce the agreement.

### 3. The Sixth Circuit Court of Appeals.

The Court of Appeals for the Sixth Circuit reached the same conclusions regarding a district court's lack of subject matter jurisdiction to enforce a settlement agreement of an action which the district court had previously unconditionally dismissed in *Hinsdale v. Farmers National Bank & Trust Co.*, 823 F.2d 993 (6th Cir. 1987). In *Hinsdale*, the parties signed a stipulation of dismissal with prejudice, even though the formal settlement documents had not yet been drafted or signed. The district court then dismissed the case with prejudice. Later, certain parties filed motions for specific enforcement of the settlement agreement. *Id.* at 994-995. The Sixth Circuit held that the district court had no jurisdiction to enforce a settlement agreement where the parties had stipulated to a dismissal with prejudice and the court had ordered the unconditional dismissal. *Id.* at 995-996. The district court's unconditional dismissal of the action with prejudice, without attempting to retain jurisdiction to enforce settlement agreement, terminated the court's jurisdiction except for the limited purpose of reopening and setting aside the judgment of dismissal, pursuant to Rule 60(b). *Id.*

The Sixth Circuit *specifically declined* to rule that the district court had inherent jurisdiction to specifically enforce the settlement agreement. *Id.* at 996. The parties had argued that the court's holding in *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368 (6th Cir.), *cert. denied*, 429 U.S. 862, 97 S.Ct. 165, 50 L.Ed.2d 140 (1976) suggested that the district court had such inherent jurisdiction to enforce the



settlement agreement. The Sixth Circuit clarified its rulings in *Aro* by stating:

> We held in *Aro Corp.* that, upon breach of a settlement agreement which terminated the litigation pending before it, a district court may *vacate* the prior order of dismissal *pursuant to Rule 60(b)*. 531 F.2d at 1371. We further held that once the proceedings are reopened, the district court has inherent jurisdiction to enforce the settlement agreement. *Id.* We did not, however, hold that a district court has jurisdiction to enforce a settlement agreement *without having vacated the prior unconditional order of dismissal with prejudice* and without having re-opened the proceedings.

*Id.* at 996 (emphasis in original) (footnote omitted).[3]

Therefore, even under the rule espoused by the Sixth Circuit, in the action before this Court, the district court lacked subject matter jurisdiction to enforce the settlement agreement.

### 4. Other Circuit Court of Appeals and District Courts.

Other circuit courts which have addressed the issue of a district court's jurisdiction have also reached the same conclusion that after an unconditional dismissal of a federal action, a party's available remedies for breach of

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[3] The court noted in the footnote omitted above that its rule that once the court has reopened the proceedings, the court has jurisdiction to enforce the settlement agreement is at odds with the decisions in *Fairfax* and *McCall-Bey*. *Id.* at 996.

the settlement agreement are: 1) file a breach of contract action, usually in state court, or 2) request the district court to vacate the dismissal pursuant to Rule 60(b) and reinstate the case to the court's docket. *See, e.g., Stipelcovich v. Sand Dollar Marine, Inc.*, 805 F.2d 599, 605 (5th Cir. 1986) (when federal suit had been dismissed, plaintiff's remedies to enforce breach of settlement agreement were to bring a new suit for breach of the agreement or to move pursuant to Rule 60(b)(6) to vacate the dismissal and reinstate the case); *Warner v. Rossignol*, 513 F.2d 678, 683 (1st Cir. 1975) (same); *Shelter-Lite, Inc. v. Reeves Bros., Inc.*, 611 F.2d 1179, 1180 (6th Cir. 1980) (same); *Harman v. Pauley*, 678 F.2d 479, 481 (4th Cir. 1982) (same).

Requesting the district court to summarily enforce the settlement agreement after an unconditional dismissal is not one of the party's available options, because the district court lacks subject matter jurisdiction. *Adduono v. World Hockey Ass'n*, 824 F.2d 617, 623 (8th Cir. 1987) (there is no inherent jurisdiction to enforce a settlement agreement where the district court failed to incorporate the agreement into the dismissal order or otherwise showed an intent to retain jurisdiction); *Village of Kaktovik v. Watt*, 689 F.2d 222, 232, n.76 (D.C. Cir. 1982) (citing *Fairfax* and indicating that there is no inherent jurisdiction to enforce a settlement agreement not made part of the dismissal order); *U.S. v. Swor*, 139 F.R.D.100, 101 (E.D. Mich. 1991) (dismissal of action forecloses district court's exercise of jurisdiction over subsequent disputes relating to dismissal, unless district court retained jurisdiction over such matters and/or the parties incorporated a settlement



agreement into order of dismissal); *Musifilm, B.V. v. Spector*, 568 F. Supp. 578 (S.D.N.Y. 1983) (Once action is terminated, district court has no power to enforce settlement which is neither ordered nor approved, absent an independent ground of jurisdiction). *See also Londono v. City of Gainesville*, 768 F.3d 1223, 1227 (11th Cir. 1985) ("Absent an independent jurisdictional base, the court had no authority *sua sponte* to transform Londono's section 1983 claim into a suit seeking the declaration of a contract of settlement and the specific performance thereof.")

The Ninth Circuit should also hold that, in a situation such as this, a district court lacks subject matter jurisdiction.

D. In the Case Before the Court, the District Court no Longer had Jurisdiction to Enforce the Settlement Agreement.

1. The case was not pending before the district court.

As discussed above, "it is well settled that a court has inherent power to enforce summarily a settlement agreement *involving an action pending before it.*" *In Re Suchy*, 786 F.2d at 902-903 (emphasis added). *Accord Springpark*, 623 F.2d at 1380; *Dacanay v. Mendoza*, 573 F.2d at 1078. In the instant action, however, the action was no longer pending[4] before the district court (CR 83). The entire case had

[4] Black's Law Dictionary (5th Ed. 1979) defines "pending" as: "Begun, but not yet completed; during; before the conclusion of; prior to the completion of; unsettled; undetermined; in process of settlement or adjustment. Thus, an action or suit is

been dismissed with prejudice in April 1992 by a voluntary stipulated dismissal and order entered into by the parties (CR 83). Fed. R. Civ. P., Rule 41(a)(1)(ii). Therefore, as the case was no longer pending before the district court, the district court's jurisdiction over the action had ended, absent any other grounds for federal court jurisdiction. As discussed below, no such grounds existed.

2. The settlement agreement which terminated the litigation between the parties was not incorporated into an order or a judgment of the court.

The district court's final order only dismissed with prejudice the complaint and counter-claim on file in the action (CR 83). Reviewing the direct language of the Stipulation and Order of Dismissal with Prejudice filed by the parties and approved by the Court, it is clear that the order of dismissal mentions nothing about the settlement agreement of the parties and provides only "that plaintiff's entire Complaint against defendant The Guardian Life Insurance Company of America herein be, and the same hereby is, dismissed with prejudice, . . . " and " . . . that defendant The Guardian Life Insurance Company of America's entire cross-complaint against plaintiff herein be, and the same hereby is, dismissed with prejudice. . . . " (CR 83).

Because the parties drafted the stipulation and Order of Dismissal, if they had wished to make note of their

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'pending' from its inception until the rendition of final judgment."



settlement agreement and have it incorporated into an order or judgment of the court, they could have done so. They did not do so (CR 83). Nor did the district court do so on its own motion (CR 83).

3. The court had not otherwise retained jurisdiction over the action.

Besides not incorporating the settlement agreement into an order or judgment of the court, the district court did not expressly or otherwise manifestly retain jurisdiction over enforcement of the settlement agreement. Indeed, the district court simply dismissed the action with prejudice (CR 83). Consequently "[t]he order of dismissal does not provide a basis for inferring a reservation of jurisdiction in order to resolve potential disputes. The fact that the order of dismissal was 'with prejudice' militates against inferring a retention of jurisdiction and strongly suggests that the district court dismissed the case outright, thereby relinquishing jurisdiction." *U.S. v. Swor*, 139 F.R.D. at 102.

4. No independent jurisdictional grounds existed.

At the time The Guardian moved the district court to enforce the settlement agreement between itself and Kokkonen, the settlement agreement was no more than an oral contract between the parties. An alleged breach of this oral agreement was remediable at state law in an action for breach of contract, or The Guardian could have

requested the district court to vacate its order of dismissal and return the action to the court's docket, pursuant to Rule 60(b)(6). *Fairfax*, 571 F.2d at 1303, 1305; *Stipelcovich*, 805 F.2d at 605. However, nothing about the oral agreement made it so rarified that it had to be enforceable only in a district court.

Had the parties just entered into the settlement agreement without ever having filed an action in district court, then any breach of the contract would be remediable only under an action in state court unless the parties were of diverse citizenship and met the federal amount in controversy. Because the amount in controversy is no longer above $50,000 for this alleged breach of the oral settlement agreement, even if the parties are still from different states, the district court no longer has subject matter jurisdiction to hear the squabbles about compliance with the settlement agreement.

The alleged breaches of the oral settlement agreement focus on: 1) the return of certain files to The Guardian (although the parties still dispute which files were to be returned to The Guardian) and 2) the prohibition of Kokkonen from making telephone calls or inquiries to The Guardian on behalf of his Guardian policyholder clients (again, still in dispute) (CR 84-88, 98, p. 7). Neither of these issues involves an amount in controversy over $50,000; therefore, the district court did not have any independent grounds for federal court jurisdiction when it entertained the Motion to Enforce Settlement Agreement and for Sanctions (CR 8488). Accordingly, its Order should be vacated by this Court.



## VI.

## CONCLUSION

Kokkonen seeks a determination from this Court that the district court was without subject matter jurisdiction to enforce the settlement agreement, and requests that the Court vacate the Order due to the district court's lack of jurisdiction.

Dated: January 13, 1993

Respectfully Submitted,

MICHAEL R. JENCKS
LISA M. PONTIUS
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By: /s/ Lisa M. Pontius
Lisa M. Pontius
Attorneys for Plaintiff/Appellant
MATT T. KOKKONEN

## STATEMENT OF RELATED CASES

There are no known related cases pending in this Court.

Dated: January 13, 1993

Respectfully Submitted,

MICHAEL R. JENCKS
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MATT T. KOKKONEN

[Proof Of Service Omitted In Printing]

No. 92-16628

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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MATT T. KOKKONEN,
Plaintiff/Appellant

vs.

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA; THE GUARDIAN INSURANCE ANNUITY CORPORATION; THE GUARDIAN INVESTOR SERVICES CORPORATION, Defendants/Appellees

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ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE HONORABLE ROBERT E. COYLE, PRESIDING
CASE NO. CV-F-90-325-REC

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# BRIEF FOR DEFENDANT/APPELLEE THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA

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## I. STATEMENT OF JURISDICTION

The district court had jurisdiction over this matter based upon diversity of citizenship under 28 U.S.C. Section 1332. The issue raised by appellant is whether the district court had jurisdiction to enforce a settlement reached with the participation of the District Court and made a part of the record. Appellee The Guardian Life Insurance Company of America submits that the district court also had jurisdiction under its "inherent power to enforce settlement agreements." *Wilkinson v. F.B.I.*, 922 F.2d 555, 557 (9th Cir. 1991).



The district court's Order Enforcing Settlement Agreement is a final decision and it is appealable as of right under 28 U.S.C. Section 1291. *See also Wilkinson v. F.B.I.*, 922 F.2d at 558. The appeal is timely as the Order was entered on August 20, 1992 (CR 98), and the Notice of Appeal was filed on September 15, 1992. (CR 100.)

## II. ISSUE PRESENTED FOR REVIEW

Whether the district court had subject matter jurisdiction to enforce a settlement agreement: (1) entered into on the record with the participation of the district judge; (2) entered into after the taking of evidence had been completed and after closing arguments to the jury were completed; (3) memorialized by the transcript of proceedings in chambers before the district judge; and (4) where that agreement called for the dismissal of the case.

## III. STATEMENT OF JURISDICTION

### A. Procedural Background

In April 1991, appellant Matt Kokkonen ("Kokkonen") filed a complaint against The Guardian Life Insurance Company of America ("The Guardian") and two related subsidiaries, alleging a variety of claims arising out of the termination of his agent's contract and general agency contracts. (CR 1.) The Guardian filed a

timely Notice of Removal based upon diversity of citizenship jurisdiction. (CR 1.) It asserted counterclaims against Kokkonen arising out of his wrongful conduct after the termination of his contracts. (CR 28.) Contrary to Kokkonen's assertion that he appeals from an order enforcing a settlement entered into with "Defendants/Appellees," the two defendants aside from The Guardian were dismissed pursuant to a Stipulation and Order filed on February 5, 1992.[1] (CR 77.)

The action proceeded through a jury trial which began on March 3 and continued through March 5, 1992. (CR 80-82.) The parties presented opening statements, affirmative, defense and rebuttal cases, and made their closing arguments to the jury. (CR 82, 98.) Before Judge Coyle instructed the jury, Kokkonen, through his counsel, sought a settlement. (CR 82.)

Kokkonen disingenuously suggests that "the parties discussed the terms of the settlement before the Court, and then filed a stipulation and order mutually dismissing with prejudice their respective causes of action." (Appellant Brief, p. 3.) In fact, the parties formally appeared in chambers before Judge Coyle and placed their settlement agreement on the record. (CR 82, 88, Exh.

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[1] This Stipulation and Order resulted in all of Kokkonen's claims being dismissed with prejudice against The Guardian Insurance and Annuity Corporation and The Guardian Investor Services Corporation. Accordingly, the appeal as to these parties plainly should be dismissed. Lisa Pontius, counsel for Kokkonen, has agreed and she has stated her agreement will be reflected in Kokkonen's Reply Brief.



B.) The transcript of the proceedings in chambers memorializes the terms of the settlement agreement and reflects the active role taken by Judge Coyle in clarifying those terms. (CR 88, Exh. B.) The transcript reveals that Judge Coyle anticipated that any proceeding to enforce the settlement would require an appearance before him. Thus, immediately after helping the parties resolve one particular issue, the court stated: "I don't want to see you people come back here to have the agreement enforced. I don't want to see anybody fooling around, that's all I can say. . . . You all have better things to do than worry about coming back here." (*Id.* at 9:6-11.)

There is no doubt that The Guardian anticipated that any proceeding to enforce the settlement would be by motion before Judge Coyle. For example, after all the details were finalized on the record before Judge Coyle, The Guardian's counsel made sure that the terms of the settlement were clear to the Court. Thus, counsel inquired: "Judge, do you understand the agreement? I just wanted to have one party not involved in this making sure that the judge understood the agreement." (*Id.* at 12:25-13:3.) Judge Coyle responded: "Oh, I understand." (*Id.* at 13:4.) The Guardian and its undersigned counsel plainly anticipated that Judge Coyle would be the U.S. District Judge who would hear and rule upon any motion to enforce the settlement placed on the record with his active participation and assistance.

Indeed, in its ruling on the motion to enforce the settlement, the Court noted its own recollection of the proceedings in chambers. Judge Coyle recognized that Kokkonen had "expressed no concern as to the certainty of the agreement at the time," and he had "no trouble

recollecting that Kokkonen was to turn over all Guardian files in his possession. This recollection [of the Court] is substantiated by the above quoted portion of the transcript." (CR 98 at 6:14-16.)

B. The Substance of the Case and the Settlement

Kokkonen's First Amended Complaint set forth claims for: (1) wrongful termination; (2) breach of fiduciary duty and failure to account; (3) interference with prospective business advantage; (4) fraud; (5) breach of lease; and (6) wrongful denial of existence of lease. (CR 12.) The Guardian's Counterclaim set forth claims for: (1) conversion or The Guardian's files; and (2) unfair competition. (CR 28.)

As noted above, the case settled after closing arguments and just before the Court instructed the jury. In summary, the terms were: (a) mutual dismissals with prejudice; (b) Kokkonen will not give his "clients" form requests to send to The Guardian, but may advise them in good faith of requests for information those "clients" should make to The Guardian; (c) Kokkonen will turn over to The Guardian all Guardian files or files containing information regarding Guardian policyholders (although he may retain copies thereof) by March 31, 1992; and (d) Kokkonen will pay ten dollars to The Guardian. (CR 88, Exh. B.)

C. The Order Enforcing Settlement Agreement

The Court's Order Enforcing Settlement Agreement (CR 98) objectively recites Kokkonen's bad faith conduct



in refusing to comply with the terms of the settlement agreement. The district court found all of Kokkonen's arguments in opposition to the motion to enforce settlement "seriously wanting." (*Id.* at 5:16-17.) The Court further stated:

> The court finds that Mr. Kokkonen has been stubbornly and unjustifiably uncooperative in refusing to comply with the terms of the settlement agreement. Mr. Kokkonen has, in fact, blatantly breached the terms of the settlement agreement by writing to The Guardian on behalf of a policyholder as well as withholding files that he agreed to return. The court will not tolerate such behavior.

(*Id.* at 7:3-9.) Thus, the district court ordered Kokkonen to turn over all pertinent files, to cease writing to The Guardian on behalf of policyholders, and to pay The Guardian its fees and costs incurred in bringing the motion. (*Id.* at 7:10-20.)

Kokkonen has not appealed in any way from the substance of the Court's Order Enforcing Settlement Agreement. He has no basis for seeking review of the Court's findings that he acted in bad faith and that he "blatantly breached" the terms of the settlement agreement. Instead, he argues that the district court lacked jurisdiction to enforce the terms of the settlement reached in chambers, and he argues that The Guardian should be forced to file a new lawsuit against him to obtain the benefit of that agreement.

## IV. THE DISTRICT COURT HAD JURISDICTION TO ENFORCE THE SETTLEMENT AGREEMENT WHICH WAS PLACED ON THE RECORD

Settlement agreements are highly favored and will be enforced whenever possible. *See, e.g., United States v. McInnes*, 556 F.2d 436, 441 (9th Cir. 1977); *Williams v. First National Bank*, 216 U.S. 582, 595, 30 S.Ct. 441, 445, 54 L.Ed. 625 (1910); *Pearson v. Ecological Science*, 522 F.2d 171, 176 (5th Cir. 1975), *cert. denied sub nom., Skydell v. Ecological Science*, 425 U.S. 912, 96 S.Ct. 1508, 47 L.Ed.2d 762 (1976). "[T]here is an overriding public interest in settling and quieting litigation." *United States v. McInnes, supra*, 556 F.2d at 441.

Consistent with the strong public policy favoring the settlement of litigation, this Court has held that "district courts have the inherent power to enforce settlement agreements." *Wilkinson v. F.B.I.*, 922 F.2d at 557. There, the parties entered into a series of discovery orders in 1984. In 1988, the last of the plaintiff's claims were dismissed. Thereafter, the plaintiff moved to compel the production of documents, which the Court of Appeals viewed as a motion to enforce the terms of a settlement agreement. This Court affirmed the district court's refusal to grant the plaintiff's motion, and in doing so explicitly found that "the district court had jurisdiction to decide the motion, under its inherent supervisory power." *Id.* at 557.

The district court in this case relied on *Wilkinson* in stating "there is no doubt that [this court] has jurisdiction to enforce the settlement agreement." (CR 98 at 5:17-19.) The district court very appropriately cited the language of *Wilkinson and Dacanay v. Mendoza*, 573 F.2d 1075 (9th



Cir. 1978) in concluding that the foundation of the trial court's power is "the policy favoring the amicable adjustment of disputes and the concomitant avoidance of costly and time consuming litigation." (CR 98 at 6:1-5.)

Kokkonen fails in his attempt to distinguish *Wilkinson*, which he mistakenly attempts to portray as merely "another related, although distinguishable, case. . . . " (Opening Brief at 10.) Kokkonen has no basis for distinguishing the case, for suggesting that the district court there explicitly retained jurisdiction to resolve post-dismissal discovery motions, or for suggesting that the appellate court did not analyze whether the district court had subject matter jurisdiction. First, the Court of Appeals plainly described the matter before it as one challenging the enforcement of a settlement agreement. Second, there is nothing in the case to suggest that the district court's order that it would resolve discovery disputes would apply to postdismissal motions. Finally, the Court of Appeals plainly analyzed "the district court's jurisdiction" in a section so entitled at page 557 of the opinion. In that section, the Court expressly concluded that the district court had jurisdiction under its "inherent power" to enforce settlement agreements and its "inherent supervisory power."

The Ninth Circuit's decision in *Wilkinson* is a logical continuation of three prior decisions – *Dacanay v. Mendoza, supra; Matter of Springpark Associates*, 623 F.2d 1377 (9th Cir.), *cert. denied*, 449 U.S. 956, 101 S.Ct. 364, 66 L.Ed.2d 221 (1980); and *In re Suchy*, 786 F.2d 900 (9th Cir. 1985). In each of these cases, this Court held that the district court had the inherent power to summarily enforce a settlement agreement in an action before it.

In *Dacanay*, the parties reached an out-of-court settlement and took the pending litigation off calendar. Because the case involved a minor, an action to obtain state court approval of the settlement was initiated, but no such approval was obtained. When the district court subsequently dismissed the original action, an appeal ensued. The Ninth Circuit, in reviewing the trial court, held that the district court had the "inherent power summarily to enforce a settlement agreement with respect to an action pending before it. . . . " *Id.* at 1078. In words clearly applicable to the pending case, the Court explained:

> The authority of a trial court to enter a judgment enforcing a settlement agreement has as its foundation the policy favoring the amicable adjustment of disputes and the concomitant avoidance of costly and time consuming litigation.

*Id.* at 1078.

In *Springpark*, the Ninth Circuit cited *Dacanay* with approval in affirming a bankruptcy court order enforcing a settlement agreement. The bankruptcy court terminated an automatic stay in accordance with a settlement agreement. It subsequently dismissed the entire action. *Id.* at 1379. Following the dismissal, the debtor Springpark Associates filed another bankruptcy action seeking in essence to circumvent its earlier settlement. The district court rejected that effort and thereby enforced the settlement agreement. In reviewing the district court's ruling in the second action, the Court of Appeals agreed that the district court had the inherent power summarily to



enforce a settlement agreement. *Accord, In re Suchy*, 786 F.2d at 902-03.

The case at bar shows starkly the wisdom of these Ninth Circuit rulings. It would be a miscarriage of justice for this Court to conclude that the district court lacked jurisdiction to enforce the settlement. Here, the settlement occurred after two years of litigation, after three days of trial (including closing arguments to the jury), and just before the case went to the jury. The terms of the settlement very clearly show that Kokkonen received nothing with respect to his claims, while he agreed to return files to The Guardian, to refrain from writing to The Guardian on behalf of his "clients," and to pay ten dollars to The Guardian. Having plainly "lost" under the terms of the settlement agreement in the district court, Kokkonen should not be permitted to repudiate that settlement and force The Guardian to initiate a new lawsuit.

That result would be particularly unjust in this case. Kokkonen agreed to a settlement with the prospect of an unfavorable jury verdict immediately before him. The District Judge played an active role in clarifying the agreement and twice threatened to send the case to the jury when Kokkonen (who was in chambers with counsel) appeared to contradict the terms of the settlement. With the district court having heard three days of testimony and argument, and having supervised the clarification of settlement terms, the interests of justice compel the conclusion that the same district court should have the power to enforce the settlement terms.

The district court's Order Enforcing Settlement Agreement should be viewed as part of or necessarily

ancillary to the original litigation. This conclusion is consistent with the strong public policy favoring settlements, with the goal of judicial efficiency and economy, and with the tradition of limiting federal courts' subject matter jurisdiction to actions presenting a federal interest. Even more importantly, this conclusion will prevent the gamesmanship being played by Kokkonen and other litigants in the future – settling a case in bad faith to divest a federal court of jurisdiction, repudiating the settlement, and then insisting that an entirely new lawsuit is necessary to enforce the settlement.

## V. THE AUTHORITY IN A NUMBER OF CIRCUITS IS CONSISTENT WITH THAT IN THE NINTH CIRCUIT

While Kokkonen would have this Court believe that other circuits uniformly would find that the district court had no jurisdiction to enforce the settlement reached before it, that is not the case. A number of other circuits undoubtedly would affirm the district court's order.

A Third Circuit opinion directly on point is *Kelly v. Greer*, 365 F.2d 669 (3d Cir. 1966), *cert. denied*, 385 U.S. 1033, 87 S.Ct. 772, 17 L.Ed.2d 692 (1967). There, the parties had lengthy settlement negotiations, and the district court periodically assisted in them. The parties eventually reached a settlement and submitted it in the form of a stipulation. Pursuant to its terms, the parties separately stipulated to a dismissal which was entered by the court. When problems arose in the performance of the settlement, the district court enforced the settlement. The Third Circuit affirmed this ruling, holding that it was "an



exercise of the District Court's power to summarily enforce settlement agreements entered into with its approval. It is settled that the District Court acted within its powers." *Id.* at 671.[2]

The same conclusion was reached by the Sixth Circuit in *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368 (6th Cir.), *cert. denied*, 429 U.S. 862, 97 S.Ct. 165, 50 L.Ed.2d 140 (1976). There, the parties entered into a settlement agreement which called for and resulted in a stipulated order of dismissal with prejudice. Following one party's failure to perform, the district court granted the other party's motion to enforce the settlement. The Court of Appeals affirmed, and in doing so rejected the argument that the district court lacked jurisdiction to enforce the settlement. Recognizing that the settlement was an outgrowth of the litigation, the Court upheld the district court's jurisdiction, holding "that courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them." *Id.* at 1371.[3]

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[2] Kokkonen cites *Backers v. Bit-She*, 549 F.Supp. 388 (N.D.Cal. 1982), for the proposition that the district court lacks jurisdiction to enforce summarily a settlement after dismissal. *Backers* distinguished *Greer v. Kelly* on the ground that the settlement in *Backers* was never made part of the record. *Id.* at 389. *Backers* is therefore inapplicable to this case where the settlement was made a part of the record.

[3] Kokkonen cites *Hinsdale v. Farmers National Bank & Trust Co.*, 823 F.2d 993 (6th Cir. 1987), as clarifying *Aro Corp.* in stating that a post-dismissal motion to enforce in the Sixth Circuit must be accompanied by a motion to set aside the dismissal order under Rule 60(b)(6) of the Federal Rules of Civil Procedure. While that is now true in the Sixth Circuit, it is not required in this Circuit.

While citing *Backers v. Bit-She, supra,* Kokkonen has chosen not to bring to the Court's attention a Northern District of California case which expressly followed *Aro Corp., Sidewinder Marine, Inc. v. Nescher,* 440 F.Supp. 680 (N.D.Cal. 1976). There, Chief Judge Peckham held that the court h d jurisdiction to enforce a settlement of the case even though the lawsuit had previously come to an end. In words clearly applicable to Kokkonen's tactics in this case, the district court explained:

> The jurisdictional analysis in Aro should be followed in the present case. If the federal courts are powerless to enforce settlement agreements, defensive gamesmanship could undercut the value of settlements in resolving disputes.

*Id.* at 682.

The Court of Appeals for the Federal Circuit more recently followed *Aro Corp.* in *Joy Manufacturing Co. v. National Mine Services Co.,* 810 F.2d 1127 (Fed.Cir. 1987). In *Joy Manufacturing,* the parties reached a settlement which was not incorporated into a judgment, but resulted in a dismissal without prejudice. Subsequently, one party filed a motion to enforce the settlement, which was denied on substantive grounds. In affirming that decision, the Federal Circuit expressly approved *Aro Corp., supra,* and held that the district court had jurisdiction to entertain and rule on the motion to enforce the settlement agreement. *Accord, U.S. v. Baus,* 834 F.2d 1114, 1127 (1st Cir. 1987) ("In order to ensure that settlement agreements are an effective form of dispute resolution, district courts who enter judgment pursuant to such an agreement necessarily have the power to mandate compliance with it.").



These decisions in other circuits all recognize the strong public policy favoring the settlement of litigation. They also recognize the inherent unfairness of allowing a party to breach a settlement agreement while denying the nonbreaching party the right to enforce that settlement in the federal court where the underlying lawsuit was pending. Indeed, that potential unfairness is especially obvious here, as Kokkonen settled after days of trial to avoid a jury verdict, and he would have this Court force The Guardian to file a new lawsuit to obtain the benefit of that settlement. Such an unfair result is not required or appropriate under Ninth Circuit authority or authority from the Federal, First, Third and Sixth Circuits. The district court had subject matter jurisdiction to enforce the settlement agreement in this case.

## VI. THE CASES CITED BY KOKKONEN IN THE FOURTH, SIXTH AND SEVENTH CIRCUITS ARE DISTINGUISHABLE

Authority in the Fourth, Sixth and Seventh Circuits cited by Kokkonen suggests that a district court may enforce a settlement agreement only if it first sets aside the dismissal order pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, or the agreement had been approved and incorporated within an order of the Court. Simply stated, these cases are inconsistent with Ninth Circuit authority, most notably *Wilkinson v. F.B.I., supra.* Moreover, these cases from other circuits should not be followed in the unique circumstances of this case.

With respect to the requirement of a Rule 60(b)(6) motion in some circuits, here Kokkonen did not raise the

issue of lack of jurisdiction or Rule 60(b)(6) motion until he filed his opposition to the motion to enforce the settlement on June 29, 1992, the very day that motion was heard. (CR 89-94.) At the hearing on the motion on that day, the district court stated: "The Court is satisfied that it has jurisdiction . . . to enforce its settlement agreement and we shall so proceed." (CR 97 at 7:4-9.) Accordingly, the subsequent reply brief filed by The Guardian did not address the jurisdictional issue which the district court already had resolved in its favor. (CR 96.)

Had the issue been raised by Kokkonen in a timely fashion, The Guardian certainly could have moved for vacation of the Stipulation and Order of Dismissal (CR 83) under Rule 60(b)(6). This would have eliminated the issue raised by Kokkonen's citation to authorities in other circuits, such as *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985). The district court's Order Enforcing Settlement Agreement in this case leaves no doubt that it certainly would have vacated the dismissal if that had been a requirement in this Circuit. (CR 98.)[4] Thus, if this Court were to find that a Rule 60(b)(6) motion is a prerequisite to enforcement, it should recognize that the district court certainly would have granted such a motion if Kokkonen had raised the issue in a timely manner, and any such error is harmless.

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[4] This is evident from the district court's conclusion that Kokkonen "has been stubbornly and unjustifiably uncooperative in refusing to comply with the terms of the settlement agreement," that he "blatantly breached the terms," that the "court will not tolerate such behavior," and that he should be sanctioned *Id.* at 7:3-23.



With respect to the requirement in the Fourth Circuit that the settlement agreement be approved and incorporated within an order of the court, imposing such a stringent requirement would be particularly unjust in this case. Here, the district court actively participated in clarifying the settlement and twice threatened to send the case to the jury because Kokkonen appeared to back away from agreed upon terms in chambers. Judge Coyle dismissed the jury only after he was satisfied that the settlement terms were clear. To say that the settlement was not approved by the district court would be to exalt form over substance.

Certainly, the dismissal order entered by the district court does not state that it is enforceable by the court. However, it is noteworthy that this was plainly contemplated by the parties and reflected in Judge Coyle's comment that he wanted the terms to be clarified and he did not want anyone violating those terms because "I don't want to see you people come back here to have the agreement enforced." (CR 88, Exh. B at 9:6-10.)

Notably, none of the authority from other Circuits cited by Kokkonen involves a case which has proceeded to trial through closing arguments, where the settlement is put on the record with the district court's participation, where the transcript is the written memorialization of the settlement, and where the district court plainly contemplated that it would enforce the settlement. Kokkonen's substantive opposition to the enforcement of the settlement – that the agreement is "fatally uncertain"; that he returned "agency files"; and that The Guardian has refused to renegotiate terms – all are matters uniquely

suited to expeditious resolution by the court that participated in creating the settlement agreement after hearing *all* testimony in the case.

It would be a manifest injustice to require The Guardian to bring a new lawsuit in state or federal court alleging breach of the agreement. If that were required, it would, in effect, be rewarding a litigant who is refusing in bad faith to perform his obligations under a settlement agreement. Ruling in this manner would allow Kokkonen to have divested the district court of jurisdiction immediately before the jury was instructed, and to have forced The Guardian to initiate a new lawsuit from scratch to obtain the benefits of a settlement reached after three days of trial in the district court.

This case starkly illustrates the serious practical consequences of finding no jurisdiction. Assuming that Kokkonen will continue to argue that the agreement is vague and unenforceable, another court may need to review the transcript of the lawsuit in the district court. Furthermore, The Guardian can imagine no better "witness" to support its position in a new lawsuit than the federal judge who presided at trial and participated in clarifying the settlement. All of these unnecessary and unjust consequences are avoided by following the holding in *Wilkinson v. F.B.I., supra,* and concluding that the district court had the inherent power and jurisdiction to enforce the settlement agreement entered into on the record in the district court.



## VII. CONCLUSION

For the foregoing reasons, it is respectfully submitted that the district court had jurisdiction to enforce the settlement agreement entered into on the record, and its Order should be affirmed.

Dated: February 26, 1993

Respectfully submitted,

EPSTEIN BECKER & GREEN

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[Proof Of Service Omitted In Printing]

No. 92-16628

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MATT T. KOKKONEN,
Plaintiff/Appellant

vs.

THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA; THE GUARDIAN INSURANCE AND ANNUITY CORPORATION; THE GUARDIAN INVESTOR SERVICES CORPORATION,
Defendants/Appellees

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THE HONORABLE ROBERT E. COYLE, PRESIDING
CASE NO. CV-F-90-325-REC

# REPLY BRIEF FOR PLAINTIFF/APPELLANT MATT T. KOKKONEN

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## I. SUMMARY OF ARGUMENT

The sole issue present before this Court is whether the district court had jurisdiction to entertain the Motion to Enforce Settlement Agreement brought by defendant/appellee The Guardian Life Insurance Company of America ("Guardian")[1] against plaintiff/appellant Matt T. Kokkonen ("Kokkonen") and enter its "Order Enforcing Settlement Agreement," dated August 19, 1992 ("Order") (CR 98). Kokkonen contends that a district court does not – and should not – have jurisdiction over a dispute involving a settlement agreement merely by virtue of having once had jurisdiction over the case that was settled, as the Guardian contends.

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[1] The Guardian Insurance and Annuity Corporation and The Guardian Investor Services Corporation are not parties to this appeal. These parties were named inadvertently by Kokkonen, and should not be named herein as defendants/appellants. Any judgment, therefore, should only reflect Kokkonen and the Guardian as the parties to this appeal.

It is undisputed by the Guardian that the underlying diversity action was no longer pending before the district court when the court heard the motion to enforce the settlement agreement, having been unconditionally dismissed with prejudice months earlier (CR 83). It is also uncontested that the settlement agreement was not embodied in an order or judgment of the court (CR 83), and that no independent federal jurisdictional grounds existed. Therefore, the district court had no subject matter jurisdiction to summarily enforce the settlement agreement, as it lost its jurisdiction over the action when it unconditionally dismissed it with prejudice.

It is clear that Guardian *could* have reduced the settlement agreement to writing and incorporated it into an order or judgment of the court, it *could* have crafted a settlement agreement that provided for enforcement of the agreement or retention of jurisdiction by the court, or it *could* have requested the district court to retain jurisdiction over the action to enforce any later disputes between the parties. However, this is not what happened. The district court did not retain jurisdiction over the action – it simply let the parties stipulate to voluntarily dismiss their respective actions with prejudice and then entered the dismissals (CR 83).

Because the settlement agreement was not incorporated into an order or judgment of the court nor did it provide for any enforcement mechanism or ongoing jurisdiction for the court, the Guardian did not request the court to retain jurisdiction or otherwise cause it to retain jurisdiction, the court on its own motion did not retain jurisdiction, and no independent jurisdictional grounds existed, the district court did not have subject matter



jurisdiction to enforce the settlement agreement of an action that had terminated and was no longer pending before it. None of the Guardian's semantical arguments can change the fact that when the court unconditionally dismissed the action with prejudice, without otherwise retaining jurisdiction, it lost its jurisdiction over the action. Therefore, even if the court later wished to hear the motion to enforce the settlement agreement months later, it no longer had the power to do so. Consequently, this Court should vacate the Order because the district court lacked subject matter jurisdiction to enter it.

## II. ADDITIONAL BACKGROUND FACTS

Kokkonen is an individual who was a general agent and agent for the Guardian for approximately fourteen years (CR 12, pp. 2-3). The Guardian terminated Kokkonen's agent and general agency agreements in 1989 and Kokkonen filed a complaint against the Guardian and related Guardian entities in superior court for wrongful termination, breaches of contract and related acts (*See* CR 12). The Guardian defendants removed the complaint to federal court on diversity jurisdiction grounds, and attacked their former agent in a counter-claim (CR 1, 28).[2] The case proceeded to trial, and at the end of trial, both Kokkonen and the Guardian agreed to enter into a settlement agreement to terminate their respective actions against each other. The settlement agreement, aside from

[2] All of the causes of action in both Kokkonen's first amended complaint and the Guardian's counter-claim are state court causes of action, and present no federal question (CR 12, 28).

the immediate terms of payment of money and entry of dismissals, is an ongoing agreement, which, *inter alia*, requires Kokkonen to turn over certain files, prohibits him from directly requesting information from the Guardian for his Guardian policyholder clients, and requires the parties to keep the settlement terms confidential (CR 88, Ex. B).

As is clear from a reading of the transcript in which the parties discussed the terms of the settlement agreement (CR 88, Ex. B), the parties had not firmly hammered out the final terms of the agreement when they went before the district court to announce their settlement. Accordingly, the parties did not "place" a settlement agreement on the record, but they did agree before the district court to the essential terms of a settlement that, among other things, would terminate the litigation between the parties (CR 88, Ex. B).

Kokkonen expected that the settlement agreement the parties negotiated would be reduced to writing, so that the terms of the agreement would be refined and clarified. The Guardian, however, refused to reduce the unclear terms of the agreement to writing (CR 88, Ex. C), preferring to rest on the vague and ill-defined terms espoused by counsel before the court (CR 88, Exs. B and C – "we will not draft a formal settlement document in connection with the . . . matter, but rather rely on the settlement agreement as stated in the court record.").[3]

[3] The Guardian attempts to paint the settlement agreement discussed before the district court as a formal recordation of a fully-resolved agreement. The terms the counsel used, however, were extremely imprecise, and the parties changed their terms throughout their discussion. (*See* CR 88, Ex. B.) For example, Kokkonen agreed to turn over various "files" to the Guardian pursuant to the settlement agreement (CR 88, Ex. B). These "files" that Kokkonen agreed to give the Guardian, and did give to them, apparently differ from the files the Guardian wanted from Kokkonen, because the Guardian filed its Motion to Enforce Settlement Agreement to compel the return of *other* files which it claims are encompassed by the settlement agreement (CR 84-88). Yet Kokkonen has fully complied with his understanding of the settlement agreement and has given the Guardian all the files he had agreed to give them pursuant to the settlement agreement (CR 89-91). The Guardian has now attempted to *stretch* the vague term "files" to reach personal files of Kokkonen's which contain commercially sensitive information in order to damage Kokkonen economically and gain an unfair competitive advantage over him (CR 89, 91). Kokkonen never agreed to give these files to the Guardian pursuant to the settlement agreement. Reviewing the transcript of the "settlement agreement," it is clear that Kokkonen constantly refers to files that are in the trunk of his car, which he brought to trial pursuant to a trial subpoena, and which are the same files he mentioned he still had possession of in his deposition. These are the files that Kokkonen reluctantly agreed to give to the Guardian, not his personal files (CR 89, 91).



Despite the fact that the settlement agreement had not been reduced to writing, Kokkonen and the Guardian agreed to voluntarily dismiss with prejudice their respective claims against each other (CR 83; 88, Ex. B). They did so (CR 83).

Months later, after Kokkonen had complied with all of his obligations under the settlement agreement, the Guardian filed a Motion to Enforce the Settlement Agreement, uncontent with the quantity and character of files that Kokkonen had delivered pursuant to the settlement agreement (*see* CR 84-91). The present dispute centers on

which files the Guardian was entitled to receive. Kokkonen maintained that he was to provide all agency files to the Guardian, which he did, but the Guardian expected that it would receive Kokkonen's personal agent files, containing confidential information, as a result of the settlement (*see* CR 84-91). Kokkonen strenuously objected that the district court did not have subject matter jurisdiction to hear the motion to enforce the settlement agreement and also argued that he had fully complied with the settlement agreement (CR 88-91). The district court ruled that Kokkonen had violated terms of the settlement agreement and entered its Order (CR 98). It is from this Order that Kokkonen appeals, claiming that the court was without jurisdiction to enforce the settlement agreement because the action was no longer pending before the court, the settlement agreement was not incorporated into an order or judgment of the court, the court had not retained jurisdiction over the matter, and no other grounds for federal jurisdiction existed.

At no time did the Guardian express any desire to incorporate the settlement agreement into an order of judgment of the court and Guardian's counsel did not want to reduce the terms of the agreement to writing, presumably in order to preserve the confidentiality of the settlement (CR 88, Ex. C). The Guardian could have sought to incorporate or set the terms of the settlement agreement into an order or judgment of the court, but it chose not to do so. Because the settlement agreement is a contract between two private parties, the Guardian also could have provided for enforcement mechanisms in the settlement agreement, such as agreeing that any disputes as to the agreement would be resolved by alternative



dispute resolution or would be heard by the district court. The parties had the ability to negotiate for terms and interpose any requirements they decided upon regarding enforcement of the settlement agreement. The Guardian chose not to do so. It should be bound by its election to stand on its oral settlement, which failed to provide for retention for federal court jurisdiction.

Now the Guardian states that it *anticipated* that the court would entertain motions to enforce the settlement agreement after its dismissed the action (Appellee's Brief, p. 3). Yet the Guardian never requested the court to retain jurisdiction, and it did nothing to cause the court to retain jurisdiction. Simply put, the Guardian may have *assumed* that the district court had jurisdiction to hear motions to enforce the settlement agreement, but it did nothing to ensure that the district court would have such jurisdiction.

The district court, too, could have expressed some reservation of jurisdiction over this matter instead of simply entering the voluntary dismissal with prejudice and dismissing the action unconditionally (CR 83). It, too, did nothing to retain jurisdiction.

It is now too late for the Guardian to state that the district court *would* have retained jurisdiction to hear the motion to enforce the settlement agreement, because the district court had already *given up* jurisdiction over the action by entering the dismissals of the action unconditionally, without any express retention of jurisdiction or retention via an order or judgment, and without any other independent grounds for federal court jurisdiction. Once the district court lost jurisdiction over this matter

by unconditionally dismissing it, it could not regain jurisdiction, except pursuant to a F.R.C.P. Rule 60(b) motion. *McCall-Bey v. Franzen*, 777 F.2d 1178, 1190 (7th Cir. 1985); *Harman v. Pauley*, 678 F.2d 479, 481 (4th Cir. 1982).

The Court does not deal in the realm of speculation, and what the district court *may* have done is irrelevant when compared to what the district court actually did. In this case, the district court failed to retain jurisdiction over the case, and neither the Guardian nor the court, acting on its own motion, requested the court to regain jurisdiction over the action by setting aside the dismissals with prejudice, under a F.R.C.P. Rule 60(b) motion. Accordingly, the district court did not have subject matter jurisdiction to enter the Order or hear the motion to enforce the settlement agreement, and the Order must be vacated.

## III. THE COURT SHOULD NOT ADOPT THE CONCEPT OF "INHERENT JURISDICTION" TO ENFORCE SETTLEMENT AGREEMENTS

The Guardian's motion to enforce the settlement agreement was a state court breach of contract action. There was no federal question present, the amount in controversy was not over $50,000, nor were there any special circumstances about the case that would warrant federal court jurisdiction. The Guardian clings to some notion that simply because the district court once had the litigation before it, even after termination of the litigation, the district court is the proper place for all motions relating to that litigation, now and always. To create such



a rule would give district courts jurisdiction in perpetuity, greatly overburdening an already overburdened court system. All of the court systems, state and federal, are crowded, but the Constitution vests federal courts with limited jurisdiction. As such, however much a federal court might like to hear a state court breach of contract action, it may not do so unless it has proper subject matter jurisdiction. The Guardian, however, wishes the Ninth Circuit to adopt this concept of "inherent jurisdiction" to enforce settlement agreements, so that any time an action has been before a federal district court, the parties may feel free to appear before that district court on all disputes relating to the matter, regardless of whether the district court still has subject matter jurisdiction over the action.

The Guardian argues that "inherent jurisdiction" to enforce settlement agreements would promote judicial economy and efficiency. But would vesting federal courts with such an unlimited inherent jurisdiction actually create judicial efficiency and conserve judicial resources overall? No. What it would do is create a federal forum for parties to go to with their state court breach of contract disputes – cases which should not be in federal court without proper grounds for federal jurisdiction. This would give the parties no incentive at all to address their contractual disputes through alternative dispute resolution or otherwise provide for enforcement mechanisms in their settlement agreements.

If the Ninth Circuit were to adopt the Guardian's concept of inherent jurisdiction to enforce settlement

agreements, they would be creating a never ending jurisdiction for the district courts. This promotes neither judicial economy or efficiency. The parties could come before the district court repeatedly in their efforts to enforce the settlement, and could be coming before the court for years after the action had terminated.

In the case before the court, this is entirely possible. The parties had an agency relationship, and they continue to do business with each other (CR 12). Kokkonen was a Guardian insurance agent for fourteen years and is still an insurance agent (CR 12). He has many clients who have Guardian insurance policies and he and the Guardian are in contact regarding those policyholders. Yet one of the terms of the settlement agreement is that Kokkonen is not allowed to request information directly from the Guardian for his Guardian policyholder clients (CR 88, Ex. B). Thus, ten years from now, if Kokkonen sends a request from a client, signed by his client on Kokkonen's letterhead, requesting information regarding the client's Guardian insurance policy, the Guardian conceivably could come before the district court to enforce the settlement agreement that terminated the litigation before the district court ten years earlier, claiming that this violates the parties' settlement agreement of 1992. Conversely, Kokkonen could come before the district court ten years form now claiming that the Guardian is breaching the confidentiality requirement of the agreement.

Or, the Guardian could decide the Kokkonen has certain files which contain the word "Guardian" somewhere on them, such as a letter from Kokkonen to a client in which he mentions the client's Guardian disability insurance policy. This, to the Guardian, could fall within



the requested "files" Kokkonen was to return, and then the Guardian would bring another motion to enforce the settlement agreement before the district court, even though the alleged breaches of contract do not present federal questions and certainly do not involve an amount in controversy of over $50,000. The district court could be hearing these state court alleged breaches of contract for the entire time that Kokkonen stays in the insurance agency business and has clients that have Guardian insurance policies. That is likely to be a long time.

This in fact is already happening. The Guardian, a huge, multi-billion dollar company, has shown that it has no aversion to running to the court, filing motions to enforce its view of the settlement agreement (*see* CR 84-88), since it failed to provide for any other enforcement mechanism in the settlement agreement. Kokkonen has repeatedly sworn that he has complied with the settlement agreement and given the Guardian all agreed upon files (CR 89-91).[4] But the Guardian disagreed, and filed the Motion to Enforce Settlement Agreement (CR 84-88). If Kokkonen now turns over the files that he supposedly still owes the Guardian under the settlement agreement, and the Guardian decides that these too are not enough, what will it do? It will run to the district court and file yet another motion to enforce the settlement agreement, and so forth.

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[4] The Guardian has not disputed that it possesses the originals of all files in dispute (CR 88-91). It is also undisputed that they possess the agency copies of these files, since Kokkonen delivered over 2000 files plus another 274 or 275 files pursuant to the settlement agreement to the Guardian's representatives.

Another reason not to adopt the concept of "inherent jurisdiction" to enforce settlement agreements is that in most cases where the action is no longer pending before the district court, the district court will not be in any better position to hear the action to enforce the settlement agreement than would a state court. Both courts will have to review the settlement agreement that terminated the litigation and review the evidence regarding the alleged breach of the agreement. That litigation may have gone through trial or it may have terminated long before the judge acquired even a working familiarity with the case. How will the Court craft a rule that grants some courts which supposedly have an intimate familiarity with the case "inherent jurisdiction" to enforce the settlement agreement, but limits other courts to the regular standards for subject matter jurisdiction?

Furthermore, in cases, such as the one present before the Court, where the terms of the settlement agreement are imprecise and subject to more than one reasonable interpretation[5], expanding the notion of federal court jurisdiction to include the concept of "inherent jurisdiction" would not promote judicial economy or efficiency. In situations were the terms of a settlement agreement are in dispute, an evidentiary hearing must be held as to the parties' intent and understanding of the terms of the

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[5] In the case present before the Court, the terms of the settlement agreement were vague and nebulous, calling for the return of "files", without ever clarifying to which specific files either party was referring (*see* CR 88, Ex. B). By reviewing the transcript, it appears that it is quite possible that the parties were talking about two different things when they used the term "files."



agreement.[6] The district courts would have to spend judicial time and energy essentially conducting "mini-trials" to determine the parties' understanding and intent as to the terms of the settlement agreement before they would then hear the state court breach of settlement agreement action. This certainly does not promote judicial economy or efficiency.

Had the Guardian wanted to, it could have ended most of the uncertainties and impreciseness of the settlement agreement by reducing it to writing. The Guardian refused to do so (CR 88, Ex. C). Because the settlement agreement is nothing more than a private contract between the parties, the Guardian and Kokkonen were free to specify and stipulate to terms in the agreement that called for the district court to retain jurisdiction over enforcement of the agreement, or that provided for some other means of enforcement. They did not do so here. The Guardian wished to keep the agreement oral, preferring to rely on the unclear statements on the record: "This is to confirm . . . that we will not draft a formal settlement document in connection with the above-reference matter, but rather rely on the settlement agreement as stated in the court record." (Letter from Guardian's counsel to

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[6] When there is a question as to the interpretation of the terms of a settlement agreement, the court is not to summarily enforce the terms of the settlement agreement, choosing one party's interpretation over the other party's interpretation. Rather, the court is to hold an evidentiary hearing to determine what the true terms of the settlement agreement are, and then enforce those terms. *See Autera v. Robinson*, 136 U.S. App.D.C. 216, 419 F.2d 1197, 1200 (1969); *Kukla v. National Distillers Products Co.*, 483 F.2d 619, 621-622 (6th Cir. 1973).

Kokkonen's counsel, CR 88, Ex. C.) The Guardian made their choice, and they should now live with its consequences.

Finally, there is nothing special or unique about this kind of state court breach of contract action that merits federal handling. This case is not a patent action, in which the federal courts are empowered with exclusive jurisdiction.[7] The legislature intended that the federal courts alone deal with issues relating to patents, and it vested them with exclusive jurisdiction over these actions. The action before the Court does not deal with patents and does not even pose a federal question. It does not even meet the federal jurisdictional amount in controversy. It is simply a state court breach of contract action that has no reason to be in federal court.

The Guardian argues that it would be unfair to make it file a state court action for breach of contract to enforce the settlement agreement, although it fails to state why it is so unfair to make it file a state court procedure after the federal court has been divested of jurisdiction to hear the action. It imposes no extra burden upon the Guardian to file an action in state court against Kokkonen for breach of contract. It is understandable that the Guardian wishes the district court to retain jurisdiction over this

[7] The cases the Guardian relies on most heavily, *Kelly v. Greer*, 365 F.2d 669 (3d Cir. 1966), *cert. denied*, 385 U.S. 1033, 87 S.Ct. 772, 17 L.Ed.2d 692 (1967) and *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368 (6th Cir), *cert. denied*, 429 U.S. 862, 97 S.Ct. 165, 50 L.Ed.2d 140 (1976), are patent actions in which the federal courts have a special interest in protecting their exclusive federal jurisdiction.



case, so it can retain the benefits of diversity jurisdiction without meeting the requirements of it and keep the action in front of a court that it perceives as sympathetic to its views. Despite the Guardian's forum preference, there is no ground upon which the district court could have retained jurisdiction over the case, unless the Court adopt this limitless concept of "inherent jurisdiction," conferring perpetual federal court jurisdiction over disputes relating to settlement agreements, regardless of whether a federal question is present or diversity requirements have been met.

## IV. THE DISTRICT COURT HAD NO JURISDICTION TO SUMMARILY ENFORCE THE SETTLEMENT AGREEMENT

The Guardian has not contested that because the action had been unconditionally dismissed with prejudice, the action was no longer pending before the court. Nor has the Guardian contested that the settlement agreement was not incorporated into an order or judgment of the court or that the district court had no independent basis for jurisdiction over the action. The Guardian's only hope for the district court's jurisdiction over the action rests on the Court's adoption of the concept of inherent jurisdiction or its arguments that the district court had jurisdiction because the parties "placed" the agreement on the record after a trial of the action, and the judge asked questions of the parties as they attempted to clarify the terms of the settlement agreement before him. This, in light of the current state of the law, is not enough to cause the court to have subject matter jurisdiction over an action that was no longer pending before it.

A. The State of the Law in the Ninth Circuit.

The Ninth Circuit has held that a district court has jurisdiction to summarily enforce settlement agreements in actions *pending before the court. In the Matter of Springpark Associates*, 623 F.2d 1377, 1380 (9th Cir.), *cert. denied*, 449 U.S. 956, 101 S.Ct. 364, 66 L.Ed.2d 221 (1980) (quoting *Dacanay v. Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978)); *In Re Suchy*, 786 F.2d 900, 902-903 (9th Cir. 1985). It is undisputed that because the court had summarily dismissed the action with prejudice in April 1992, the action was no longer pending before it when the court entertained the motion to enforce the settlement agreement (CR 83).

The Ninth Circuit also has held that a district court has jurisdiction to summarily enforce a settlement agreement when the district court has some other basis for federal court jurisdiction, such as when the court has retained jurisdiction over the action or when the settlement agreement is incorporated into an order or judgment of the court. *See Wilkinson v. FBI*, 922 F.2d 555 (9th Cir. 1991). *See also Denali Seafoods, Inc. v. Western Pioneer, Inc.*, 92 F.R.D. 763, 764 (W.D. Wash. 1981) (district court would not enforce a settlement agreement between the parties after the case had been dismissed because "[the] agreement was not incorporated into the order of dismissal; rather, it was an independent contract entered into by the parties. Hence, the agreement never had the force, effect or weight or an order of this court. . . . ") Again, it is uncontested that the court did not incorporate the settlement agreement into an order or judgment of the court. Also, if the district court had wanted to retain



jurisdiction over the action, it could have taken positive action indicating retention of jurisdiction over the case, such as incorporating the settlement terms into an order of the court. Finally, it is also uncontested that no independent jurisdictional ground existed, because the amount in controversy did not meet the federal jurisdictional minimum.

The Ninth Circuit, however, has never held what the Guardian wishes it to hold: that district courts have the inherent power to summarily enforce a settlement agreement merely because the court once had jurisdiction over the action. *See McClendon v. U.S.*, 885 F.2d 627, 632-633 (9th Cir. 1989). The closest the Court came to holding this was in *Wilkinson*, but even there the district court had expressly retained jurisdiction over the action to resolve disputes relating to the settlement agreement and the issues in dispute were embodied in court orders. *See Wilkinson*, 922 F.2d at 559.

The parties in *Wilkinson* entered into several stipulations which collectively comprised their settlement agreement, and the parties entered into a number of discovery orders which are all part of the "settlement agreement." The parties agreed that in exchange for the plaintiffs' release of all claims against the defendants, the defendants would produce thousands of pages of documents. The district court then entered final judgment and dismissed the case. The district court clearly *retained jurisdiction* to enforce the settlement agreement by agreeing when it approved the parties' settlement agreement to review the production of documents and "hear and resolve" disputes over the production of documents, and the discovery orders themselves are orders of the court

which granted the court jurisdiction to enforce disputes relating to their terms. *Wilkinson*, 922 F.2d at 559.

The Court in *Wilkinson* did state that "[d]istrict courts have the inherent power to enforce settlement agreements," citing *In Re Suchy* and *Springpark*. *Wilkinson*, 922 F.2d at 557. Both *In Re Suchy* and *Springpark*, however, only state that courts have such power in actions *pending before them*.[8] *See Springpark*, 623 F.2d at 1380; *Decanay*, 573 F.2d at 1078. A cursory reading of *Wilkinson* might suggest that *Wilkinson* stands for the proposition that a district court has subject mater jurisdiction to summarily enforce a settlement agreement that had terminated litigation in an action originally brought before the district court, but that is a large step for the Ninth Circuit to have made without providing further analysis and clarification.

It is clear that the district court in *Wilkinson* retained jurisdiction to hear disputes regarding the settlement agreement because the stipulations which comprised the settlement agreement provided *explicitly* for the district court to "hear and resolve" disputes as to the adequacy of the defendants' compliance and to review defendants' claims of privilege. *Wilkinson*, 922 F.2d at 559. Also, the discovery orders themselves incorporate the terms of the "settlement agreement" between the parties. It is upon

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[8] In *In Re Suchy*, as in *Springpark*, jurisdiction to summarily enforce the settlement agreement rested upon the underlying action still being pending before the court; therefore, the court had power to summarily enforce the settlement agreement. *See In Re Suchy*, 786 F.2d at 901-903.



these bases that jurisdiction of the district court should be founded.

In attempt to show that the Ninth Circuit has already adopted the concept of inherent jurisdiction to enforce settlement agreements, the Guardian mischaracterizes a district court case, *Sidewinder Marine, Inc. v. Nescher*, 440 F.Supp. 680 (N.D. Cal. 1976), a patent infringement action. The court in *Sidewinder* did not need to rely on any "inherent jurisdiction" of the district court because the court already had jurisdiction to enforce a settlement agreement between the parties. It had retained jurisdiction over the agreement by entering a permanent injunction dealing with the issue of the settlement agreement. *Sidewinder*, 440 F.Supp. at 681. The court, however, did stress the importance that in *patent actions*, for which the federal courts have *exclusive* jurisdiction, the parties should not be able to divest the federal courts of their exclusive jurisdiction by entering into a settlement agreement. It therefore concluded that the federal courts should remain available to parties to enforce a patent action settlement agreement. *Sidewinder*, 440 F.Supp. at 682. Because the instant action does not involve an issue of exclusive federal jurisdiction such as patents, as discussed above, this "rule" of the district court in *Sidewinder* relating to patent actions is not applicable here.

Thus, no Ninth Circuit case has held that federal courts have a limitless inherent jurisdiction to enforce a settlement agreement that terminated an action before them regardless of whether federal jurisdiction exists, and it should not hold so now.

B. Many Other Circuits Have Held that in a Situation Similar to that Present Before the Court, the District Court Did Not Have Jurisdiction.

As pointed out in Kokkonen's opening brief, the Fourth Circuit has squarely addressed this exact issue in *Fairfax Countywide Citizens Ass'n v. Fairfax County*, 571 F.2d 1299 (4th Cir.), *cert. denied* 439 U.S. 1047, 99 S.Ct. 722, 58 L.Ed.2d 706 (1978), which held that the district court does not have limitless inherent subject matter jurisdiction to enforce a settlement agreement that terminated litigation before it. It held that the district court has the inherent power to enforce a settlement agreement only once it has federal jurisdiction over the case or controversy. *Fairfax*, 571 F.2d at 1304.

The Seventh Circuit reached the same conclusions in *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985), holding that a district court does not have jurisdiction over a dispute involving a settlement agreement "merely by virtue of having had jurisdiction over the case that was settled." *McCall*, 777 F.2d at 1185. The *McCall* court held that there is no such thing as inherent federal jurisdiction to summarily enforce agreements that settled federal court actions. Rather, there must be some form of jurisdiction within the court – such as a deliberate retention of jurisdiction by the court or an independent reason for jurisdiction – if the settlement agreement by which the federal case was dismissed is to be enforceable in federal court. *Id.* at 1187-1189. Otherwise, the settlement agreement is merely a private contractual matter between the parties, and any dispute relating to this agreement is remediable under a state court action, unless the action



meets the regular requirements for federal court jurisdiction. *Id.* at 1186.

According to the *McCall* court, after the court unconditionally dismisses an action, the only way to regain federal court jurisdiction is to move the court pursuant to F.R.C.P. Rule 60(b) to vacate the dismissal and reinstate the action to the active case list. *Id.* at 1186. *Accord Warner v. Rossignol*, 513 F.2d 678, 683 (1st Cir. 1975); *Stipelcovich v. Sand Dollar Marine, Inc.*, 805 F.2d 599, 605 (5th Cir. 1986). The Guardian admits in its papers that it did not move the district court pursuant to F.R.C.P. 60(b)(6) to vacate the dismissal of the action, thereby reinstating jurisdiction over the action in the district court. The Guardian attempts to explain its failure to bring such a motion by blaming *Kokkonen* for not telling the Guardian earlier that this was a necessary step before the district court would have jurisdiction to hear the motion to enforce the settlement agreement. (Appellee's Brief, p. 15.) It is not up to Kokkonen to instruct Guardian's counsel on the state of the law or proper procedural requirements. Guardian's counsel is presumed to be competent and to have a working knowledge of federal civil procedure and federal law.

The Guardian also attempts to avoid the requirements of bringing a F.R.C.P. Rule 60(b)(6) motion by stating that had it known it needed to bring such a motion, it "certainly could" have done so. (Appellee's Brief, p. 15.) True, it could have, and should have. But it did not. Then the Guardian goes even further in its hypothecations, stating that if it had in fact brought a Rule 60(b)(6) motion, the district court "certainly would have vacated the dismissal." (Appellee's Brief, p. 16.) Now the

Guardian has become a mind-reader, presuming to forecast the rulings of the district court.

In its final ludicrous stab at avoiding the requirements of bringing a F.R.C.P. Rule 60(b) motion in a case such as this, where the district court had given up jurisdiction by entering an unconditional dismissal of the action with prejudice and where no other conceivable grounds for jurisdiction existed, the Guardian argues that this requirement is a mere technicality, "and any such error is harmless." (Appellee's Brief, p. 16.) Subject matter jurisdiction is not a matter that can be waived by the parties, or by the district courts, and the failure to have subject matter jurisdiction is neither a mere technicality nor a harmless error. It is grounds for vacating the court's Order, because the district court lacked subject mater jurisdiction to hear the motion to enforce the settlement agreement.

The Sixth Circuit similarly held in *Hinsdale v. Farmers National Bank & Trust Co.*, 823 F.2d 993 (6th Cir. 1987) that the district court had no jurisdiction to enforce a settlement agreement where the parties had stipulated to a dismissal with prejudice and the court had ordered the unconditional dismissal. *Hinsdale*, 823 F.2d at 995-996. The district court's unconditional dismissal of the action with prejudice, without attempting to retain jurisdiction to enforce the settlement agreement, terminated the court's jurisdiction except for the limited purpose of reopening and setting aside the judgment of dismissal, pursuant to F.R.C.P. Rule 60(b). *Id.* at 995-996. As discussed, the Guardian did not, and has not, filed a motion pursuant to F.R.C.P. 60(b) for relief from the order of



dismissal; therefore, the district court had no jurisdiction to enforce the settlement agreement.

As pointed out in Kokkonen's opening brief, the Sixth Circuit held in *Hinsdale* that district courts do not have inherent jurisdiction to specifically enforce settlement agreements after termination of the litigation. *Hinsdale*, 823 F.2d at 996. One of the parties in *Hinsdale* had argued that the court's prior ruling in *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368 (6th Cir.), *cert. denied*, 429 U.S. 862, 97 S.Ct. 165, 50 L.Ed.2d 140 (1976), another patent infringement action upon which the Guardian heavily relies, held that the district court had such inherent jurisdiction to enforce the settlement agreement. The Sixth Circuit clarified its ruling in *Aro*, stating: "We did not, however, hold that a district court has jurisdiction to enforce a settlement agreement *without having vacated the prior unconditional order of dismissal with prejudice* and without having re-opened the proceedings." *Id.* at 996 (emphasis in original). The Guardian concedes in its papers that *Hinsdale* modified *Aro*, yet it persists in arguing that *Aro* should be followed.

The decision in *Aro*, which is a patent infringement action, in and of itself does not even support the Guardian's imposition of "inherent jurisdiction" in this action. The court in *Aro* started its analysis by stating the principle that has long been recognized by the Ninth Circuit: "Courts retain the inherent power to enforce agreements entered into in settlement of litigation *pending before them.*" *Aro*, 531 F.2d 1368, 1371 (emphasis added). The Guardian has admitted that this action was no longer pending before the court when the court entertained the motion to enforce the settlement agreement.

The court in *Aro* continued by stating that the lower court was also correct in vacating the prior order of dismissal under F.R.C.P. Rule 60(b) because one of the parties was attempting to repudiate the settlement agreement. *Id.* at 1371. Its next sentence stated that the court had inherent power, and "when required in the interests of justice, the duty to enforce the agreement which had settled the dispute pending before it." *Id.* This supports two items: it was necessary to first file a Rule 60(b) motion before the court had jurisdiction to enforce the settlement agreement, and because this was a patent action, in which the federal courts have exclusive jurisdiction, this is a situation where the "interests of justice" require the federal court to enforce the settlement agreement. The Guardian wishes to overlook that even in *Aro*, the court first granted the request for the Rule 60(b) motion, then vacated the order of dismissal and reinstated the case to the court's docket. Therefore, the case was again pending before the court.

The Guardian also mistakenly argues that *Kelly v. Greer*, 365 F.2d 669 (3d Cir. 1966), *cert. denied*, 385 U.S. 1033, 87 S.Ct. 772, 17 L.Ed.2d 692 (1967), another patent action, supports its position. The Guardian is wrong. *Kelly* involved a very procedurally complicated patent action in which the court ended up enforcing a settlement agreement of an action that was *pending before it*. In *Kelly*, the parties reached a settlement agreement which they placed on the record. The court then dismissed the action with prejudice, pursuant to the parties' stipulation for dismissal. *Kelly*, 365 F.2d at 670. Defendant allegedly breached the settlement agreement. Plaintiff filed state court actions for breach of the settlement agreement and



then filed a motion requesting the court to vacate its order of dismissal pursuant to F.R.C.P. Rule 60(b)(6) and reinstate the case so that it could enforce the settlement agreement. The court denied all the motions. On appeal, the appellate court ruled that the district court should have vacated its order of dismissal and ordered the district court to do so. Consequently, the district court vacated the order of dismissal and *reinstated the case* to its active docket list. *Id.* at 670-671. The case was now *pending before the court*. The court *then* enforced the settlement agreement it had before it in an action that was once again properly before it. *Id.* at 672. This is in accord with the Ninth Circuit's rule that the district court can enforce settlement agreements in actions pending before it.

### C. None of the "Reasons" the Guardian Cites Support the District Court Having Jurisdiction Over the Motion to Enforce the Settlement Agreement.

The Guardian places a great deal of emphasis upon the facts that the settlement agreement was reached near the conclusion of trial, that the parties discussed the terms of the settlement on the record, and that the district court judge asked questions of the parties as they laboriously attempted to define the terms of their settlement agreement on the record (*see* CR 88, Ex. B). Yet none of these facts strengthen a substantive argument that the district court had subject matter jurisdiction to enforce the settlement agreement that terminated the litigation that had been pending before it.

It is irrelevant that the settlement agreement came about at the end of the trial, because this has nothing to

do with granting the district court jurisdiction after the district court has already given up jurisdiction by unconditionally dismissing the action. Also, as discussed above, the parties did not truly "place" a refined settlement agreement on the record. Instead, they attempted to define the basic terms of their oral settlement agreement on the record. Moreover, they never went the next step further and reduced the settlement agreement to writing or had it incorporated into an order or a judgment of the court. This would have been simple enough to do, but the Guardian preferred to rest upon the loose, oral agreement it had made (CR 88, Ex. C). This was the Guardian's choice. The Guardian could have provided for enforcement mechanisms in the settlement agreement or requested the court to retain jurisdiction, but it did not do so.

Finally, had the court wished to retain jurisdiction over the action, it too could have taken steps to retain jurisdiction. Instead, the court only entered the voluntary dismissals with prejudice and unconditionally dismissed the action (CR 83).

## V. CONCLUSION

Based on the foregoing arguments and authorities, as well as those submitted in Kokkonen's opening brief, Kokkonen respectfully submits that the district court lacked proper subject matter jurisdiction to hear the



motion to enforce the settlement agreement and accordingly its Order enforcing the settlement agreement must be vacated.

Dated: March 13, 1993

Respectfully Submitted,

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[PROOF OF SERVICE OMITTED IN PRINTING]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| MATT T. KOKKONEN,<br>Plaintiff-Appellant,<br>v.<br>GUARDIAN LIFE INSURANCE COMPANY OF AMERICA; THE GUARDIAN INSURANCE AND ANNUITY CORPORATION; THE GUARDIAN INVESTOR SERVICES CORPORATION,<br>Defendant-Appellee. | No. 92-16628<br>D.C. No. CV-90-00325-REC<br>MEMORANDUM*<br>(Filed May 18, 1993) |

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, Chief Judge, Presiding

Submitted April 27, 1993**

Before: BROWNING, KOZINSKI, and RYMER, Circuit Judges.

Matt T. Kokkonen appeals from the district court's order enforcing a settlement agreement between Kokkonen and the Guardian Life Insurance Co. Kokkonen

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Accordingly, appellee's request for oral argument is denied. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.



contends that the district court lacked subject-matter jurisdiction to issue an order enforcing the settlement agreement because (1) the action was no longer pending before the court at the time it issued the order, (2) the agreement was not incorporated into the order of the court disposing the action, and (3) the court neither explicitly retained jurisdiction nor has an independent basis for jurisdiction to enforce the agreement. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, and we affirm.

The existence of subject-matter jurisdiction is a question of law which we review de novo. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 496 U.S. 937 (1990).

A district court has the "inherent power summarily to enforce a settlement agreement with respect to an action pending before it. . . . The authority of a trial court to enter a judgment enforcing a settlement agreement has as its foundation the policy favoring the amicable adjustment of disputes and the concomitant avoidance of costly and time consuming litigation." *Dacanay v. Mendoza*, 573 F.2d 1075, 1078 (9th Cir. 1978) (citations omitted); *Wilkinson v. Federal Bureau of Investigation*, 922 F.2d 555, 557 (9th Cir. 1991). Thus, the district court may, following its dismissal of an action pursuant to a settlement agreement, enter a subsequent order enforcing the terms of the agreement. *See Wilkinson*, 922 F.2d at 557.

Here, Kokkonen filed the present action in April, 1991 alleging claims arising out of the termination of his agent's contract with defendant Guardian Life Insurance Company (Guardian) and two other defendants who

were dismissed pursuant to stipulation. Guardian filed a cross-complaint against Kokkonen. The action was tried before a jury. Following closing arguments but before the district court instructed the jury, Kokkonen sought a settlement dismissing his action and Guardian's cross-claims with prejudice. An oral agreement requiring Kokkonen to provide Guardian with certain documents and dismissing the claims and counter-claims between the parties was stated in its entirety on the record before the district court in chambers. On April 13, 1992, the court entered a Stipulation and Order of Dismissal with Prejudice pursuant to the terms of the settlement agreement.

On May 21, 1992, Guardian filed a motion in district court to enforce the settlement agreement against Kokkonen claiming that Kokkonen had failed to produce the required documents and otherwise failed to comply with the terms of the agreement. Following a hearing on the motion, the district court issued an order enforcing the agreement against Kokkonen and ordering him to pay Guardian its fees and cost incurred in filing the motion to enforce the agreement.

Despite Kokkonen's arguments to the contrary, our holding in *Wilkinson* is dispositive of the issue of the district court's jurisdiction to enter an enforcement order, the sole issue in this appeal. In *Wilkinson*, the district court dismissed the plaintiff's action pursuant to a settlement agreement. The agreement in that case called for release of the plaintiff's claims against the defendant in exchange for the defendant's production of certain documents. Two months after dismissal of the action, the



plaintiff filed a motion to enforce the settlement agreement alleging that the defendant failed to produce documents as required by the agreement. The district court denied the motion, and the plaintiff appealed. In affirming the district court's decision, we expressly held that the "district court had jurisdiction to decide the motion[ ] under its inherent supervisory power." 922 F.2d at 557. Similarly here, the district court properly assumed jurisdiction to decide Guardian's post-judgment motion. *See id.*

**AFFIRMED.**